"IMMIGRATION LAW SERIES: APPELLATE ADJUDICATION PART III"

Wednesday, November 16, 2016
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

AGENDA

This session will be held in the K.D. Rooney Training Center (Tower - 18th Floor)

ADJUDICATING CLAIMS UNDER THE CONVENTION AGAINST TORTURE: A PRACTICAL FRAMEWORK

This presentation will provide attendees with a brief history of the Convention Against Torture ("CAT"), as well as a framework for adjudicating torture claims in immigration proceedings. It will explore emerging trends in the Federal circuit courts' jurisprudence, including what constitutes torture and what qualifies as acquiescence by a public official or person acting in an official capacity. Finally, the presentation will offer attendees practical guidance in resolving frequently recurring issues that arise in adjudicating such CAT claims.

LEARNING OBJECTIVES

By the completion of this session, attendees should:

- Be aware of the origins of the Convention Against Torture ("CAT") and understand its regulatory framework;
- Know the types of harm and the key requirements of a viable CAT claim;
- Comprehend the meaning of key concepts that arise in adjudicating CAT claims, such as "willful blindness" and acquiescence by local officials or individuals acting under "color of law"; and
- Understand how to resolve frequently recurring issues related to the types of evidence presented in support of a claim under the CAT.

9:30 – 10:00 a.m. **Registration**

10:00 – 10:05 a.m. **Introduction**
Chuck Adkins-Blanch, Moderator
Vice Chairman
U.S Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

10:05 – 10:10 a.m. **Background on the Convention Against Torture**
Robyn Brown, Speaker
Judicial Law Clerk
U.S Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

10:10 – 10:15 a.m. **Burden of Proof**
Robyn Brown, Speaker

10:15 – 10:25 a.m. **The Definition of Torture**
Robyn Brown, Speaker

10:25 – 10:35 a.m. **Understanding the Concept of Acquiescence**
Joseph Hassell, Speaker
Attorney Advisor
U.S Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

10:35 – 10:45 a.m. **Break (No CLE Credit)**

10:45 – 11:00 a.m. **Application of Acquiescence Standard**
Joseph Hassell, Speaker

11:00 – 11:05 a.m. **Summary**
Joseph Hassell, Speaker

11:05 – 11:20 a.m. **Evidentiary Issues that Arise in Assessing Torture Claims**
Terese Ibarra, Speaker
Attorney Advisor
U.S Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

11:20 – 11:25 a.m. **Questions & Answers**

INTERNATIONAL RELIGIOUS FREEDOM LAW AND TRENDS

This session will examine the International Religious Freedom Act and the statutorily-created United States Commission on International Religious Freedom. It will also discuss recent developments in international religious freedom, as such developments impact religious-based persecution claims. The session will further examine countries in which claims of religious persecution often arise, as well as legal issues relevant to the adjudication of religious-based applications for asylum and other forms of protection under the Immigration and Nationality Act. Specific countries discussed will include Iran, Bangladesh, and Syria.

LEARNING OBJECTIVES

By the end of this session, attendees should be able to:

- Understand the current state of religious freedom in featured nations, including Iran, Bangladesh, and Syria;
- Understand current international religious freedom trends and consider the potential impact of these trends on migration; and
- Understand the legal issues relevant to the adjudication of religious-based applications for asylum and other forms of protection under the Immigration and Nationality Act.

1:00 – 1:30 p.m. **Registration**

1:30 – 1:35 p.m. **Introduction**
David Saadat, Moderator
Attorney Team Leader
U.S Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

1:35 – 1:50 p.m. **U.S Commission on International Religious Freedom**

Elizabeth, Cassidy, Speaker
Co-Director for Policy and Research
U.S. Commission on International Religious Freedom (USCIRF)

1:50 – 2:05 p.m. **Iran**

Dwight Bashir, Speaker
Co-Director for Policy and Research
U.S. Commission on International Religious Freedom (USCIRF)

2:05 – 2:15 p.m. **Bangladesh**

Sahar Chaudhry, Speaker
Senior Policy Analyst
U.S. Commission on International Religious Freedom (USCIRF)

2:15 – 2:25 p.m. **Break (No CLE)**

2:25 – 2:45 p.m. **Syria**

Jomana Qaddour, Speaker
Policy Analyst
U.S. Commission on International Religious Freedom (USCIRF)

2:45 – 3:00 p.m. **Questions & Answers**

David Saadat, Moderator

Convention Against Torture: Background

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), S. Treaty Doc. No. 100-20, at 20 (1988), 23 I.L.M. 1027, 1028 (1984).

- Purpose: "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." CAT, *supra*, pmbl.
- There are currently 160 parties and 83 signatories to the CAT.
- Article 1, paragraph 1, defines torture.
- Article 3 prohibits refoulement of an individual to a country where he or she faces torture.
- Article 5, paragraph 2, provides for universal jurisdiction (not only based on territory or the offender's nationality but also over acts of torture committed outside its territory by persons not being its nationals).

I. Significant CAT dates
   a. United Nations General Assembly (UNGA) requested that the United Nations Human Rights Commission draft a convention against torture in 1977;
   b. adopted by UNGA on December 10, 1984;
   c. opened for signature on February 4, 1985;
   d. entered into force June 26, 1987;
   e. signed by the United States on April 18, 1988;
   f. ratified by Senate on October 27, 1990. 136 Cong. Rec. S17, 486-501 (daily ed. Oct. 27, 1990);
   g. became binding on the United States in November 1994. U.N. Doc. 571 Leg/SER.E/13.IV.9 (1995); Convention, art. 27(2).

II. Implementation of Article 3 of the CAT was initiated by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA). Section 2242, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-761 (Oct. 21, 1998) (codified at note to 8 U.S.C. § 1231).
   a. "[It is] the policy of the United States not to expel ... or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . ." FARRA § 2242(a) (codified at note to 8 U.S.C. § 1231)
   b. FARRA authorizes the appropriate agencies to adopt implementing regulations. *Id.* (contained in 8 C.F.R. §§ 1208.16–1208.18).
   c. The regulations state that CAT protection "will be granted either in the form of withholding of removal or . . . deferral of removal," 8 C.F.R. § 1208.16(c)(4).
   d. The regulations provide a definition of torture:
      i. any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 1208.18(a)(1).
      ii. The regulations further state that torture is "an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment . . ." 8 C.F.R. § 1208.18(a)(2).

See Matter of J-E-, 23 I&N Dec. 291, 294-95 (BIA 2002); *see also Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005); *Li v. Ashcroft*, 312 F.3d 1094, 1103 (9th Cir. 2002), *reh'g en banc granted, opinion vacated sub nom. Xu Ming Li v. Ashcroft*, 335 F.3d 858 (9th Cir. 2003), *on reh'g en banc sub nom. Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004).

For more information, including obligations of state parties, procedural history, selected preparatory documents, and current participation status of the CAT, see the United Nations Audiovisual Library of International Law, available at http://legal.un.org/avl/ha/catcidtp/catcidtp.html.

Eligibility for Protection Under the CAT

I. Burden of Proof

Alien must establish he or she is more likely than not to be subject to torture if returned to the country of removal. 8 C.F.R. § 1208.16(c)(2).

(1) Substantial risk standard: *Gutierrez v. Lynch*, 834 F.3d 800, 2016 WL 4446086 at *3 (7th Cir. Aug. 24, 2016) ("[T]he proper inquiry in CAT cases is whether the alien faces a substantial risk of torture if removed.").

a. The Seventh Circuit has noted that the *more likely than not* phrase "cannot be and is not taken literally." *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135 (7th Cir. 2015).

b. The court reasoned that the "more likely than not" standard (1) would contradict the CAT's "substantial grounds for believing that" an alien "would be in danger of being" tortured, (2) would dictate that someone with even slightly less than a 50.1% probability of being tortured would be removed, and (3) is not enforceable because the necessary statistical data is unobtainable. *Rodriguez-Molinero v. Lynch*, *supra*, 808 F.3d at 1135–36.

II. Assessment of Evidence

All evidence relevant to the possibility of future torture shall be considered, including, but not limited to the following categories. *See* 8 C.F.R. § 1208.16(c)(3).

(1) Past torture inflicted upon the applicant.

a. Past torture does not give rise to a presumption of future torture, unlike past persecution. *Munyakazi v. Lynch*, 829 F.3d 291, 301 (4th Cir. 2016); *Suzhen Meng v. Holder*, 770 F.3d 1071, 1076–77 (2d Cir. 2014); *Konou v. Holder*, 750 F.3d 1120, 1224–26 (9th Cir. 2014); *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005).

(2) Viability of relocation as a means to avoid torture.

a. Under the CAT regulations, the petitioner is not required to prove that internal relocation is impossible, nor does the burden shift to the government to establish internal relocation would be reasonable. *Maldonado v. Lynch*, 786 F.3d 1155, 1162–64 (9th Cir. 2015); *but see Yakovenko v. Gonzales*, 477 F.3d 631, 636–37 (8th Cir. 2007) (holding that the petitioner failed to establish the conditions in Ukraine would make internal relocation unreasonable).

(3) Evidence of gross, flagrant or mass violations of human rights within the country of removal.

a. The Board's interpretation of a State Department country report is entitled to deference, but the Board must generally provide individualized analysis regarding how the report will affect the petitioner's situation. *Konou v. Holder*, *supra*, 1125–27; *see also, e.g.*, *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 247 (4th Cir. 2013) ("State Department reports are 'highly probative evidence' of conditions in foreign countries"); *Hui Lin Huang v. Holder*, 677 F.3d 130, 138 (2d Cir. 2012) (noting that State Department reports are "usually the best available source of information on country conditions").

b. The unique vulnerabilities of transgender respondents must be considered when analyzing country conditions information. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015) (remanding where the Board assumed that the passage of laws protecting the gay and lesbian community would effectively protect a transgender respondent).

(4) Other relevant information regarding country conditions.

a. Failure to meaningfully consider all forms of evidence may result in remand. *See, e.g., Pieschacon-Villegas v. Att'y Gen. of U.S.*, 671 F.3d 303, 313 (3d Cir. 2011) (remanding where the Board failed to discuss much of the evidence submitted, including country reports and the respondent's credible testimony); *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011) (remanding where the Board provided insufficient analysis of expert testimony and failed to acknowledge an expert witnesses).

III. Torture Definition

Pursuant to 8 C.F.R. § 1208.18(a) and *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), torture must involve all five of the following elements:

(1) The act must cause **severe physical or mental pain or suffering**. 8 C.F.R. § 1208.18(a)(1). For example:

a. Torture does not include "lesser forms of cruel, inhuman or degrading treatment." 8 C.F.R. § 1208.18(a)(2).

i. Prison conditions must be sufficiently extreme to constitute torture. *See, e.g.*, *Cole v. Att'y Gen. of U.S.*, 712 F.3d 517, 532–34 (11th Cir. 2013) (holding that temporary detention of deportees was not torture where there was no egregious physical abuse); *Gourdet v. Holder*, 587 F.3d 1, 7 (1st Cir. 2009) (holding that being struck by prison guards or inmates, and being subjected to "overcrowding, unsanitary conditions, and deprivation of food, water and medical care" did not rise to the level of torture); *Pierre v. Gonzales*, 502 F.3d 109, 121 (2d Cir. 2007) ("The failure to maintain standards of diet, hygiene, and living space in prison does not constitute torture under the CAT unless the deficits are sufficiently extreme and are inflicted intentionally rather than as a result of poverty, neglect, or incompetence.");

Prela v. Ashcroft, 394 F.3d 515, 519 (7th Cir. 2005) (concluding that the petitioner's brief detention, interrogation, and injury to hands did not amount to torture); *Cadet v. Bulger*, 377 F.3d 1173, 1193–94 (11th Cir. 2004) (concluding indefinite detention, poor prison conditions, and mistreatment by police in Haiti were not torture).

ii. Discrimination and taunts are not torture. *See, e.g.*, *Rashiah v. Ashcroft*, 388 F.3d 1126, 1132 (7th Cir. 2004).

iii. Petitioner's brief detention and repeated stops, searches, physical assaults, sexual abuse and humiliation were persecution but not torture. *Haider v. Holder*, 595 F.3d 276, 287–89 (6th Cir. 2010).

iv. Case remanded where the Board did not address the claims of a mentally ill Haitian respondent with AIDS who asserted he would be imprisoned, singled out for crawl-space confinement for weeks or months, and subjected to severe beating. *Jean-Pierre v. U.S. Att'y Gen.*, 500 F.3d 1315, 1324 (11th Cir. 2007).

b. Mental pain or suffering must be prolonged mental harm caused by or resulting from one of the categories below. 8 C.F.R. § 1208.18(a)(4).

i. Intentional or threatened infliction of severe physical pain or suffering.

ii. Administration or application or threatened administration of mind altering substances or procedures calculated to disrupt profoundly the senses or the personality.

iii. Threat of imminent death.

(1) The threat of even a painless death constitutes torture if it is deliberately employed to cause such acute mental anguish. *Comollari v. Ashcroft*, 378 F.3d 694, 697 (7th Cir. 2004).

iv. Threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application or threatened administration of mind altering substances or procedures calculated to disrupt profoundly the senses or the personality.

(1) The persecutor need not actually intend to cause the threatened result. *Zubeda v. Ashcroft*, 333 F.3d 463, 474 (3d Cir. 2003).

(2) A parent's psychological harm from his/her child being subjected to FGM may be cognizable as torture. *Kone v. Holder*, 620 F.3d 760, 765–66 (7th Cir. 2010).

(3) Mental anguish caused by property deprivation, even the loss of one's home, is not within the definition of torture. *Jo v. Gonzales*, 458 F.3d 104, 109 (2d Cir. 2006).

(4) Examples of severe pain or suffering include rape, *Zubeda v. Ashcroft*, *supra*, at 472–73, and FGM, *Musa v. Lynch*, 813 F.3d 1019, 1024 (7th Cir. 2016) ("Female genital mutilation is torture, of course."); *see Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (suggesting that past FGM may be a "continuing harm" entitling the respondent to CAT protection).

(2) The act must be **intentionally inflicted**.

a. *Specific intent* to cause severe pain or suffering is required. 8 C.F.R. § 1208.18(a)(5).

b. Definitions of "specific intent":

i. "[T]he intent to accomplish the precise criminal act that one is later charged with." *Matter of J-E-*, *supra*, at 301 (quoting Black's Law Dictionary 813–14 (7th ed. 1999)).

ii. The actor intends the actual consequences of his conduct, as compared to "general intent," which is "[t]he intent to perform an act even though the actor does not desire the consequences that result." *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (quoting Black's Law Dictionary 825 (8th ed. 2004)).

c. The specific intent requirement is consistent with the purpose of the CAT. *See, e.g.*, *Oxygene v. Lynch*, 813 F.3d 541, 545–56 (4th Cir. 2016).

d. Analysis of the specific intent element should not be merged with analysis of the government acquiescence element. *Roye v. Att'y Gen. of U.S.*, 693 F.3d 333, 343-45 (3d Cir. 2012) (remanding where the Board "inappropriately conflated the *mens rea* necessary to prove government acquiescence" with the specific intent *mens rea* necessary to prove an actor committed acts of torture).

e. Disputes about this element most frequently arise within the context of inadequate medical care and/or deplorable conditions. Most of the circuit courts have determined that these circumstances do not constitute torture absent specific intent to cause severe pain or suffering.

i. First Circuit – *Gourdet v. Holder*, *supra*, at 4–7 (agreeing with *Matter of J-E-* and *Elien v. Ashcroft*, *infra*, with regard to substandard Haitian prison conditions); *Settenda v. Ashcroft*, 377 F.3d 89, 95–96 (1st Cir. 2004) (upholding the Board's determination that Uganda's "alarming" prison conditions did not constitute torture); *Elien v. Ashcroft*, 364 F.3d 392, 398–99 (1st Cir. 2004) (affirming the denial of a motion to reopen based on changed

country conditions where the petitioner failed to distinguish that the torture of Haitian detainees was more pervasive than that in *Matter of J-E-*).

ii. Second Circuit – *Pierre v. Gonzales*, *supra*, at 113–19 (holding that harsh conditions at Haitian prison, absent specific intent, did not constitute torture, notwithstanding the petitioner's medical condition).

iii. Third Circuit – *Roye v. Att'y Gen. of U.S.*, *supra*, at 343–44 (3d Cir. 2012) (explaining the "specific intent" *mens rea* requirement pertains to those who commit torture, not those who consent or acquiesce to acts of torture); *Denis v. Att'y Gen. of U.S.*, 633 F.3d 201, 218 (3d Cir. 2011) (comparing the case to *Pierre v. Att'y Gen. of U.S.*, *infra*, and concluding the petitioner did not demonstrate Haitian prison officials would specifically intend to inflict pain because of potential symptoms resulting from his medical condition); *Kang v. Att'y Gen. of U.S.*, 611 F.3d 157, 166–67 (3d Cir. 2010) (granting CAT protection where the petitioner would more likely than not "be beaten, suffocated, deprived of sleep, shocked with electrical current, and/or forced to stand for long periods of time, and that this would be done with the purpose of causing her severe pain and suffering"); *Pierre v. Att'y Gen. of U.S.*, 528 F.3d 180, 187–89 (3d Cir. 2008) (clarifying that unintended consequences of poor prison conditions do not satisfy "specific intent," in which the torturer has the goal, motive, or purpose to inflict severe pain or suffering); *see also Auguste v. Ridge*, 395 F.3d 123, 139–148 (3d Cir. 2005) (concluding the DOJ's adoption of the CAT's implementing regulations, as interpreted by *Matter of J-E-*, is the controlling standard for relief, and determining that indefinite detention in brutal conditions was not "torture" without specific intent).

iv. Fourth Circuit – *Munyakazi v. Lynch*, *supra*, at 302 (affirming the agency's determination that although conditions in Rwandan military facilities may rise to the level of torture, Rwandan authorities lacked specific intent to inflict severe pain or suffering on civilian detainees); *Oxygene v. Lynch*, *supra*, at 550 (deferring to the Board's interpretation of the CAT's specific intent requirement).

v. Fifth Circuit – *Majd v. Gonzales*, 446 F.3d 590, 597 (5th Cir. 2006) (upholding the IJ's determination that most of the petitioner's suffering was inflicted without specific intent, and on the two occasions the actors specifically intended to inflict harm, the harm did not rise to the level of severe pain or suffering).

vi. Sixth Circuit – No published cases.

vii. Seventh Circuit – *Lenjinac v. Holder*, 780 F.3d 852, 856 (7th Cir. 2015) (affirming the Board's denial of CAT deferral where the petitioner did not demonstrate conditions in Bosnia-Herzegovina were intended to inflict pain

and suffering on prisoners); *Abdoulaye v. Holder*, 721 F.3d 485, 492 (7th Cir. 2013) (denying CAT protection where the petitioner failed to establish the harsh prison conditions in Nigeria were specifically intended to inflict pain and suffering on the prisoners).

viii. Eighth Circuit – *Mervil v. Lynch*, 813 F.3d 1108, 1110 (8th Cir. 2016) (following *Cherichel, infra*); *Cherichel v. Holder*, 591 F.3d 1002, 1014–15 (8th Cir. 2010) (holding the specific intent standard can only be satisfied by proving that an actor has the goal or intent of inflicting severe physical or mental pain or suffering, but taking no position on whether the Board's interpretation in *Matter of J-E-* was entitled to deference).

ix. Ninth Circuit – *Eneh v. Holder*, 601 F.3d 943, 948 (9th Cir. 2010) (remanding where the Board did not consider evidence that Nigerian prison guards would intentionally withhold AIDS medication from the petitioner as a form of punishment); *Villegas v. Mukasey*, *supra*, at 987–89 (holding that "torture" required specific intent to inflict harm, and concluding that inadequate psychiatric care at a Mexican institution did not constitute torture).

x. Tenth Circuit – No published decisions.

xi. Eleventh Circuit – *Jean-Pierre v. U.S. Att'y Gen.*, *supra*, at 1325–26 (remanding where the Board did not adequately address the petitioner's claims that he would likely be intentionally singled out for torture due to his AIDS-related mental illness); *Cadet v. Bulger*, *supra*, at 1193–94 (concluding the petitioner failed to establish he would more likely than not be intentionally subjected to torture where poor prison conditions in Haiti were universal and not directed at returnees).

(3) The act must be **inflicted for a proscribed purpose**.

a. Examples of proscribed purposes: obtaining information or a confession, punishing, intimidating, coercing, or discriminating. 8 C.F.R. § 1208.18(a)(1). This list is not exhaustive. *Matter of J-E-*, *supra*, at 298 ("The definition of torture illustrates, but does not define, what constitutes a proscribed or prohibited purpose.").

b. The Second Circuit has noted that "[e]vidence showing an illicit purpose may easily overlap with evidence showing a specific intent to inflict severe pain or suffering." *Pierre v. Gonzales*, *supra*, at 119.

c. The purpose requirement of the CAT was met with regard to a petitioner's past torture where the severe mistreatment was inflicted punitively. *Nuru v. Gonzales*, *supra*, at 1220 (9th Cir. 2005).

(4) The act **cannot arise from lawful sanctions**.

a. "Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the [CAT] to prohibit torture." 8 C.F.R. § 1208.18(a)(3).

b. Indefinite detention may not constitute torture. *Cadet v. Bulger*, *supra*, at 1192–93 (holding that Haiti's policy of detaining criminal deportees indefinitely did not violate the CAT because it was implemented to protect the public from increased criminal activity); *but see Ridore v. Holder*, 696 F.3d 907, 919 (9th Cir. 2012) (remanding for reconsideration where the petitioner distinguished his situation from *Matter of J-E-* and the IJ found the petitioner risked detention that would extend beyond several weeks).

c. Overcrowding, beatings, inadequate sanitation, and inadequate medical care in prison facilities may fall within the exception for lawful sanctions. *Pavlyk v. Gonzales*, 469 F.3d 1082, 1091 (7th Cir. 2006).

d. Torture of military deserters is not a lawful means of punishment. *Nuru v. Gonzales*, *supra*, at 1221 ("A government cannot exempt torturous acts from CAT's prohibition merely by authorizing them as permissible forms of punishment in its domestic law."); *see also Ghebrehiwot v. Att'y Gen. of U.S.*, 467 F.3d 344, 359 (3d Cir. 2006) (remanding for a determination of whether a military deserter would be subjected to torture).

e. Torture is not a lawful means of extracting a confession from a suspected criminal. *Khouzam v. Ashcroft,* 361 F.3d 161, 169 (2d Cir. 2004) ("It would totally eviscerate the CAT to hold that once someone is accused of a crime, it is a legal impossibility for any abuse on that person to constitute torture.").

(5) The act must be **inflicted by or at the instigation of or with the consent or acquiescence of an offender** who has custody or physical control of the victim.

a. See additional training materials regarding "acquiescence," "awareness," and "public official."

b. The "custody or physical control" element does not require the perpetrator to be a public official. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1019 (9th Cir. 2004) (explaining that the regulations and Senate's official understanding of the CAT "clearly establish that a petitioner may qualify for withholding of removal by showing that he or she would likely suffer torture while under *private parties'* exclusive custody or physical control").

Recent Circuit Court Cases Remanding for Reconsideration of CAT

9th Circuit

1. ***Zaldana-Morales v. Lynch***, No. 12-73999, 2016 WL 3974180 (9th Cir. July 25, 2016) (unpublished)
   The Ninth Circuit Court of Appeals ("Ninth Circuit") held that the BIA erred in affirming the denial of the petitioner's claims of asylum and withholding of removal based upon past persecution and fear of future persecution due to the fact that he had come forward as a witness against violent gang activity in El Salvador, and identified a specific person as a leader of this gang activity. In rejecting this claim, the Ninth Circuit found that the BIA did not have the benefit of its en banc decision in *Henriquez–Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013), which held that Salvadoran witnesses who testified against gang members could constitute a protected social group for asylum purposes. **The Court further held that the record also does not contain *country condition reports* and is otherwise inadequate for the BIA to make a full and fair determination regarding whether the petitioner had a reasonable fear of future persecution and whether he was eligible for protection under the CAT.**

2. ***Weldegebrial v. Lynch***, 646 F. App'x 565 (9th Cir. 2016) (unpublished)
   The Ninth Circuit held that the Immigration Judge and the BIA erred in finding trivial inconsistencies, which neither go to the heart of the matter, nor "[c]onsidering the totality of the circumstances, and all relevant factors," do they indicate a lack of credibility. **Further, the inconsistencies did not have anything to do with the petitioner's detailed description of his ill treatment by police during his detention where he was facing charges for attempting to avoid the National Service, which is powerfully corroborated by the Country Report on Eritrea.** The Court found that the error infects the asylum, withholding and CAT determinations. **That is especially true in light of the Country Report, which suggests that those in the petitioner's position are often persecuted, tortured, or both, when forced to return to Eritrea.**

3. ***Bhattarai v. Lynch***, 835 F.3d 1037 (9th Cir. 2016)
   The Ninth Circuit held that the alleged inconsistencies found by the BIA are either unsupported by the record or are more properly considered gaps in corroboration, and the Immigration Judge failed to give the petitioner notice and an opportunity to provide the corroborative evidence she deemed necessary as required by *Ren v. Holder*, 648 F.3d 1079, 1090–92 (9th Cir. 2011). The Immigration Judge and the BIA also summarily denied the petitioner's application for relief under the CAT to the extent that it was based on the flawed adverse credibility determination regarding his asylum and withholding claims.
   The Ninth Circuit further held that **in the CAT context, the BIA *must* consider "all evidence relevant to the possibility of future torture," including country conditions evidence.** 8 C.F.R. § 208.16(c)(3); *Madrigal v. Holder*, 716 F.3d 499, 508 (9th Cir. 2013) ("Under CAT's implementing regulations, the BIA must consider all evidence of country conditions to determine the likelihood that an applicant would be tortured.").

4. ***Chhor v. Lynch***, No. 12-73023, 2016 WL 4437619 (9th Cir. Aug. 23, 2016) (unpublished)
Citing to the Department of State Report, the Ninth Circuit held that the record compels the conclusion that the petitioner has a well-founded fear of future persecution where the petitioner's asylum claim was based on his refusal to participate in a government corruption scheme to divert funds from his company to the ruling Cambodian People's Party, which resulted in the petitioner receiving anonymous murder threats. *See* 2015 State Department Country Reports on Human Rights Practices: Cambodia (stating that "[c]orruption [in Cambodia] was considered endemic and extended throughout all segments of society, including the executive, legislative, and judicial branches of government"). The Court further held that the petitioner demonstrated that he was and continues to be unable to report the past threats or any future threats to Cambodian authorities—corruption in Cambodia is rampant; the police have been involved in efforts to suppress dissent and reporting critical of the government; and there are no legal protections for those who expose corruption.

5. ***Singh v. Lynch***, 632 F. App'x 417 (9th Cir. 2016) (unpublished)
The Ninth Circuit held that the Board's determination was unsupported insofar as the agency concluded that the petitioners failed to meet their burden of proof for asylum and withholding of removal because the lead petitioner's testimony was not clear as to the reason why police arrested him, and the background did not support his claim. **The Court further held that it is not clear if the BIA considered all relevant evidence in analyzing the lead petitioner's CAT claim, including his past mistreatment by police.**

6. ***Najarro-Revolorio v. Lynch***, 653 F. App'x 555 (9th Cir. 2016) (unpublished)
The Ninth Circuit found that in assessing the petitioner's claim, the BIA first stated that the petitioner had "not presented any persuasive evidence that, upon his removal to Guatemala, it is more likely than not that he will be tortured by or with the acquiescence (including the concept of 'willful blindness') of a public official." However, the BIA then went on to state that the petitioner had "not supported his claim that his ex-girlfriend or her new boyfriend are connected to Guatemalan politicians or government officials that would be in a position to cause him harm rising to the level of torture." **The Court held that denying relief based on the alleged persecutors' lack of connection to government officials, alone, is impermissible where the petitioner's claim was based on fear of torture from private citizens.** The Court further held that because the BIA's reasoning is unclear, remand was necessary for clarification of the BIA's analysis under the correct legal standard.

7. ***Singh v. Lynch***, 639 F. App'x 468 (9th Cir. 2016) (unpublished)
The Ninth Circuit held that where evidence in the record would be probative to the CAT analysis, but the BIA did not indicate how it viewed or weighed the evidence, the Court has often remanded for a fuller explanation of the agency's reasoning. *See Madrigal v. Holder,* 716 F.3d 499, 508–09 (9th Cir.2013). **The Court further held that the Immigration Judge and the BIA did not consider probative evidence in the record, such as the fact that law enforcement officials were unwilling to respond when the petitioner reported the attacks.**

8. ***Ramos v. Lynch***, 636 F. App'x 710 (9th Cir. 2016) (unpublished)
The Ninth Circuit held that the BIA and the Immigration Judge erred by failing to consider the petitioner's argument that she will likely be persecuted or tortured if removed to El Salvador because she is a transgender woman. The petitioner clearly asserted her gender identity as a basis for relief distinct from her sexual orientation. However, the Court found that the Immigration Judge improperly conflated the petitioner's gender identity and sexual orientation. **Further, although the BIA acknowledged that the petitioner is transgender, its opinion offered no indication that it actually considered whether she is entitled to withholding or CAT relief as a result.**[1]

9. ***Moreno v. Lynch***, 624 F. App'x 531 (9th Cir. 2015) (unpublished)
The Ninth Circuit held that the Board "erred in assuming that recent anti-discrimination laws in Mexico have made life safer for transgender individuals while ignoring significant *record evidence* of violence targeting them." *Avendano–Hernandez v. Lynch,* 800 F.3d 1072, 1075 (9th Cir.2015). On remand, the Court held that the BIA shall take into consideration the dangers faced by transgender women in Mexico when reviewing the petitioner's application for asylum, withholding of removal and protection under the CAT.[2]

2nd Circuit

10. ***Lumanikio v. Lynch***, 640 F. App'x 109 (2d Cir. 2016) (unpublished)
The Second Circuit Court of Appeals ("Second Circuit") held that the BIA did not err in finding that the petitioner failed to establish a nexus between his past persecution or well-founded fear of future persecution and a statutorily protected ground where the petitioner claimed that he was harmed because he refused to marry an army colonel's daughter in the Congo – a motivation not encompassed by one of the statutory asylum grounds.
With respect to CAT relief, however, the Court held that the Board did not adequately consider the issue of government acquiescence. Given the private nature of the dispute here, the Court found that the Board reasonably concluded that the colonel was not acting in his official capacity as a member of the military. Acquiescence, however, may be shown even when officials act in their "purely private capacities," provided that the torture is of a "routine nature." *Khouzam v. Ashcroft,* 361 F.3d 161, 171 (2d Cir. 2004). The Court further held that neither the Immigration Judge nor the BIA appeared to have considered **the U.S. Department of State's 2010 Country Report on human rights practices in the Democratic Republic of Congo, which indicates that, at the time in question, government officials in the Congo engaged in acts constituting torture, often with impunity, and often for seemingly private reasons.** For example, the report states that there "were several occasions during the year when members of state security forces

[1] Following the Ninth Circuit's remand, the Board remanded to the Immigration Judge with instructions to reassess the respondent's CAT claim based on the Ninth Circuit's decision. The Board's decision stated that since the respondent's beating by the police were by "a public official," no other government acquiescence needs to be shown.

[2] Following the Ninth Circuit's remand, the Board remanded to the Immigration Judge for further fact-finding regarding the threat faced by transgender women in Mexico and consideration of reports on country conditions.

arbitrarily and summarily killed civilians ... often for failing to surrender their possessions, submit to rape, or perform personal services." U.S. Department of State, 2010 Human Rights Report: Democratic Republic of the Congo (2011).[3]

11. ***Walker v. Lynch***, No. 15-184, 2016 WL 4191844 (2d Cir. Aug. 9, 2016) (unpublished)

The Second Circuit found that in concluding that the petitioner failed to demonstrate government acquiescence, (1) the Immigration Judge determined that there was insufficient evidence that the Jamaican government "indirectly condones the torture of" gay individuals; and (2) the BIA, while acknowledging evidence that Jamaican police generally do not investigate crimes against gay individuals, concluded that this evidence was insufficient to demonstrate acquiescence because it "does not describe whether the failure to investigate in most cases was purposeful and because of the victims' sexuality." **The Court held that the Immigration Judge's statement appears to have overlooked the contrary record evidence, and further, that the BIA's statement appears to have misapplied the applicable standard by "conflat[ing]" the CAT's "specific intent requirement... with the concept of state acquiescence."** *See Pierre v. Gonzales*, 502 F.3d 109, 118 (2d Cir. 2007) (explaining that, "[b]ecause the CAT reaches torture committed by or *acquiesced in* by government actors, it is not always necessary that the specific intent required by section 208.18(a)(5) be formed by the government itself"); *see Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) ("In terms of state action, torture requires *only* that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it"). **The Court remanded for the Board to consider whether it is more likely than not that the petitioner will be tortured if removed to Jamaica and that the government will acquiesce in such torture, particularly in light of (1) the *evidence of country conditions* reflecting the general failure of the Jamaican police to investigate crimes against gay individuals, and (2) the petitioner's testimony regarding threats he received from family members.**

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[3] Following the Second Circuit's remand, the Board remanded to the Immigration Judge to reassess the respondent's CAT claim with regard to government acquiescence, which may be established where an official acts in a purely private capacity under *Khouzam v. Ashcroft, supra.*

The Concept of Acquiescence Case Summaries Organized By Topic

by

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The author's views expressed herein do not represent the views of the Board of Immigration Appeals, the Executive Office for Immigration Review, or the Department of Justice.

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I. Background

A. Regulatory History

In May 1988, President Regan transmitted to the Senate the United Nations Convention Against Torture ("CAT") for approval with nineteen proposed United States conditions. *Zheng v. Ashcroft*, 332 F.3d 1186, 1192 (9th Cir. 2003) (citing 136 Cong. Rec. 36,193 (1990) (statement of Senator Pell)). "One of those conditions was an understanding that the United States interpreted the term a*cquiescence* to 'require[] that the public official, prior to the activity constituting torture, have knowledge of such activity.'" *Id.* (quoting *Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. 101-30, at 15 (1990)). According to the Senate Foreign Relations Committee, "[t]hose conditions, in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide." *Id.* (quoting S. Exec. Rep. No. 101-30, at 4).

In 1990, the President George H.W. Bush submitted a revised and reduced list of proposed United States conditions on the Convention. *Id.* at 1192-93. Under one of these new conditions, "the United States no longer required a public official to have 'knowledge of [torture]' to acquiesce to torture; rather the public official need only an 'awareness' of torture." *Id.* at 1193 (quoting S. Exec. Rep. No. 101-30, at 9, 30). "The Committee stated that the purpose of requiring awareness, and not knowledge, 'is to make it clear that both actual knowledge and "willful blindness" fall within the definition of the term "acquiescence."'" *Id.* (quoting S. Exec. Rep. No. 101-30, at 9).

In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act of 1998, Div. G of Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822–2681-823, implementing Article 3 of the CAT. Pursuant to this enacting legislation, the former Immigration and Naturalization Service was directed to prescribe regulations implementing the obligations of the United States under the CAT. The implementing regulations for the CAT were codified at 8 C.F.R. §§ 208.16–208.18, 1208.16–1208.18. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8,478, 8,488-8,492 (Feb. 19, 1999); Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 10,349, 10,352 (Mar. 5, 2003).

These regulations define torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). The regulations, in turn, provide that: "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). Section 1208.18(a)(7) mirrors the Senate's understanding of the term "acquiescence" that "a public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." 64 Fed. Reg. at 8,483

(citing 136 Cong. Rec. 36,198). "Thus the definition of torture includes only acts that occur in the context of governmental authority." *Id.* (citing *Convention Against Torture*, submitted to the Senate, May 20, 1988, S. Treaty Doc. No. 100-20, at 19 (1988)).

B. Standard of Review

First Circuit

None

Second Circuit

De La Rosa v. Holder, 598 F.3d 103, 107-09 (2d Cir. 2010) (stating that the Board reviews the legal question of official acquiescence de novo and related findings of fact for clear error).

Third Circuit

Green v. Att'y Gen. of U.S., 694 F.3d 503, 507 (3d Cir. 2012) (characterizing the Immigration Judge's determination "that the Jamaican government would not consent to or acquiesce in potential retributive violence carried out by the Shower Posse" as a "factual determination").

Fourth Circuit

Saintha v. Mukasey, 516 F.3d 243, 250 (4th Cir. 2008) (reviewing determination regarding governmental acquiescence for substantial evidence, a standard reserved for factual findings).

Fifth Circuit

None

Sixth Circuit

Unpublished

De Leon-Reynoso v. Holder, 573 F. App'x 531, 538 (6th Cir. 2014) (holding that "the IJ's and the BIA's factual determination that [the alien] would not be tortured by Guatemalan officials, or at their acquiescence, is supported by substantial evidence").

Seventh Circuit

None

Eighth Circuit

Ramirez-Peyro v. Gonzales, 477 F.3d 637, 640–41 (8th Cir. 2007) (remanding because it was unclear whether the Board had engaged in appellate fact-finding with respect to the role of Mexican officials in inflicting or acquiescing to torture).

Ninth Circuit

Unpublished

Estrada-Corona v. Holder, 554 F. App'x 579 (9th Cir. 2014) ("Whether an alien, if removed, is more likely than not to be tortured by or with the acquiescence of public officials is a mixed question of law and fact, but the BIA's review of the factual portions of that question remains subject to the clear error standard.").

Tenth Circuit

None

Eleventh Circuit

Unpublished

Nnani v. U.S. Att'y Gen., 143 F. App'x 249, 252 (11th Cir. 2005) (upholding the Immigration Judge's denial of CAT under substantial evidence review because nothing in the record "compel[led] a reasonable factfinder to conclude that [the alien] would be tortured by someone acting 'at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'").

C. Specific Intent versus Acquiescence

Second Circuit

Pierre v. Gonzales, 502 F.3d 109, 118 (2d Cir. 2007) ("It is also important that the concept of specific intent not be conflated with the concept of state acquiescence. . . . A private actor's behavior can constitute torture under the CAT without a government's specific intent to inflict it if a government official is aware of the persecutor's conduct and intent and acquiesces in violation of the official's duty to intervene.").

Eighth Circuit

Cherichel v. Holder, 591 F.3d 1002, 1014 (8th Cir. 2010) (noting "that the element of specific intent is separate and distinguishable from the element of state acquiescence. The definition of

torture in 8 C.F.R. § 208.18(a) makes clear that it is the torturer who must possess the specific intent to inflict severe physical or mental pain or suffering, not necessarily the state actor").

II. Purely Private Acts Lacking Government Involvement

Supreme Court

Negusie v. Holder, 555 U.S. 511, 536 n.6 (2009).

The CAT limits its definition of torture to acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," while asylum and withholding of removal are available to victims of harm inflicted by private actors, without regard to state involvement.

First Circuit

Tendean v. Gonzales, 503 F.3d 8, 12 (1st Cir. 2007) (concluding that there was no evidence that any public official instigated or acquiesced in the harassment the alien's family suffered after the alien's father was elected to the town council at the hands of supporters of the father's opponent where there is no indication that this opponent ever assumed a government post).

Lopez De Hincapie v. Gonzales, 494 F.3d 213, 221 & n.3 (1st Cir. 2007).

The court concluded that the alien had not adduced any evidence that the prospective torturers were state actors or alternatively, that the authorities would be in some way complicit (or, at least, acquiescent) in the torture, and thus that she was ineligible for CAT relief. The court noted that, although the alien submitted extensive country condition evidence suggesting that the Colombian government turns a blind eye to guerilla and paramilitary violence, she had not shown that her tormentors were members of one of these groups (as opposed to common criminals).

Kasneci v. Gonzales, 415 F.3d 202, 205 (1st Cir. 2005) (affirming the denial of relief under the CAT because, in light of the fact that no link had been established between the attacks the alien experienced in Albania and his attackers' alleged political or government affiliations, the alien did not show that the attacks were carried out by or with the acquiescence of a public official).

Ang v. Gonzales, 430 F.3d 50, 59 (1st Cir. 2005) ("The broadcasted death threat does not satisfy the definition of torture because the IJ supportably attributed that threat to a disgruntled ex-employee and not to a public official.").

Second Circuit

None

Third Circuit

Shehu v. Att'y Gen. of U.S., 482 F.3d 652, 658 (3d Cir. 2007) (finding that an alien who was victimized by a criminal gang that was motivated by pecuniary gain had not shown that he was "more likely than not" to be tortured with the consent or acquiescence of the Albanian government).

Fourth, Fifth, and Sixth Circuits

None

Seventh Circuit

Pavlyk v. Gonzales, 469 F.3d 1082, 1090 (7th Cir. 2006) (finding that alien had not shown the requisite level of acquiescence where he had been threatened by a private individual, who was not a public official or acting in an official capacity, and could not identify the individuals who shot at him, although he speculated that the police "organized" the shooting).

Ishitiaq v. Holder, 578 F.3d 712, 718 n.3 (7th Cir. 2009) (holding that an alien who had been shot at by an Islamist militants had not alleged that the Pakistani government would torture him or acquiesce to his torture as needed for protection under CAT).

Eighth Circuit

Doe v. Holder, 651 F.3d 824, 827, 831 (8th Cir. 2011).

The alien, a citizen of Mexico, petitioned for review of the Board's denial of deferral of removal under CAT. The alien was a member of a special police unit, and most of the members of the unit were corrupt. *Id.* at 827. Another individual in the unit, who was not corrupt, was shot twice in the back of the head, only to have an investigation dropped and the death reported as a suicide. *Id.* The alien submitted a "white paper" and nine newspaper and magazine articles about police corruption in Mexico. *Id.* When the alien tried to report corruption to his superiors, several men attacked by running him off the road, getting out of the car, covering his face, beating him, and stabbing him. *Id.* These men told him to "keep [his] mouth shut." *Id.* Sometime after the attack, a group of men broke into the alien's father's house and told his father that they will find the alien and kill him. *Id.*

In determining whether the government would acquiesce to torture, the court stated that the alien did not show "that any authorities in Mexico participated in or acquiesced in his prior attack, or even were aware of it, or that such authorities would be more likely than not to participate or acquiesce in such conduct in the future." *Id.* at 831. The petition for review was denied.

Mohamed v. Gonzales, 477 F.3d 522, 527 (8th Cir. 2007) (holding that alien, who presented evidence that he would be ostracized and beaten by other Somalis because he was a member of a

minority clan who displayed signs of mental illness had not shown "torture by or with the acquiescence of the government").

Ninth Circuit

Lkhagvasuren v. Lynch, 828 F.3d 1080, 1082 (9th Cir. 2016) (denying the alien's CAT claim because he had not "allege[d] or prove[n] any actual government connection to his former employer's scandalous business practices of selling poisonous alcohol, which were later publicly opposed by the government. Nor has he shown that the alleged harm inflicted upon him or his family involved government officials or their acquiescence.").

Regalado-Escobar v. Holder, 717 F.3d 724, 731 (9th Cir. 2013) (holding that the alien had "not shown that public officials were aware of the attacks by the National Liberation Front for Farabundo Marti").

Cf. Reyes-Reyes v. Ashcroft, 384 F.3d 782, 787-88 (9th Cir. 2004) (remanding for further consideration of the alien's CAT claim that he would be tortured in El Salvador as a homosexual male with a female identity because the Immigration Judge had improperly required the alien to show that he would be tortured "by someone in the [Salvadoran] government or acting on behalf of the government" without addressing acquiescence).

Tenth Circuit

None

Eleventh Circuit

D-Muhumed v. U.S. Att'y Gen., 388 F.3d 814, 820 (11th Cir. 2004) (holding that the alien did not demonstrate that the harm he suffered was inflicted at the instigation of, or with the consent or acquiescence of, a public official in Somalia because the objective evidence indicated "that Somalia currently has no central government, and the clans who control various sections of the country do so through continued warfare and not through official power").

III. Willful Acceptance Standard

First Circuit

Granada-Rubio v. Lynch, 814 F.3d 35, 39 (1st Cir. 2016) (appearing to treat acquiescence and "willful blindness" as distinct issues, stating that the alien had "not shown that she will be subject to torture through the acquiescence or willful blindness of a public official").

Mayorga-Vidal v. Holder, 675 F.3d 9, 20 & n.6 (1st Cir. 2012) (declining to decide the issue and concluding that the alien has not shown acquiescence regardless of the standard applied).

Eleventh Circuit

Reyes-Sanchez v. U.S. Att'y Gen., 369 F.3d 1239, 1243 (11th Cir. 2004) (declining to address the willful acceptance versus willful blindness issue).

Board

Matter of Y-L-, A-G-, & R-S-R-, 23 I&N Dec. 270, 283 (A.G. 2002) (finding that the relevant inquiry under the CAT is "whether governmental authorities would approve or 'willfully accept' atrocities committed against persons in the respondent's position").

Matter of S-V-, 22 I&N Dec. 1306, 1312-13 (BIA 2000).

The alien moved to reopen, claiming that he would be harmed by guerrillas in Colombia. At issue was whether the alien had demonstrated that these guerrilla groups committed torture with the acquiescence of the Colombian government. The Board held that to establish the requisite acquiescence by a public official, the alien must show that the Colombian officials willfully accepted the guerrillas' torturous acts. Despite evidence that guerrilla violence was widespread in Colombia, the Board concluded "that a government's inability to control a group ought not lead to the conclusion that the government acquiesced to the group's activities." *Id.* at 1312. The Board found that the respondent had not shown that the "Colombian Government's failure to protect its citizens is the result of deliberate acceptance of the guerrilla's activities." *Id.* at 1313. As a consequence, the alien's motion was denied.

IV. Willful Blindness Standard

First Circuit

None

Second Circuit

De La Rosa v. Holder, 598 F.3d 103, 109 (2d Cir. 2010).

The court observed that the CAT's implementing regulations clarify, and the Senate voted for ratification with, the understanding that, "[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." *Id.* (citing 8 C.F.R. § 208.18; 136 Cong. Rec. 36,198 (1990)). Based on these regulations, the court reaffirmed that "torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it." *Id.* (citing *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004)).

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004), *amended* ("In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.").

Third Circuit

Silva-Rengifo v. Att'y Gen. of U.S., 473 F.3d 58, 69 (3d Cir. 2007), *amended* ("[A]n alien seeking relief under the CAT can establish that the government in question acquiesces to torture by showing that the government is willfully blind to a group's activities. Any more restrictive reading of the CAT would be inconsistent with the fact that the Senate ratified the Convention only after attaching an understanding that acquiescence does not require 'actual knowledge.'").

Fourth Circuit

Suarez-Valenzuela v. Holder, 714 F.3d 241, 245-46 (4th Cir. 2013) ("Under the willful acceptance standard, an applicant must demonstrate that government officials had actual knowledge of his or her torture to satisfy the CAT's acquiescence requirement. By contrast, pursuant to the willful blindness standard, government officials acquiesce to torture when they have actual knowledge of or "turn a blind eye to torture." Several courts—including this Court—have discredited the willful acceptance standard, with many noting that it does not reflect Congress's intent in enacting the CAT.").

Fifth Circuit

Hakim v. Holder, 628 F.3d 151, 156 (5th Cir. 2010).

The alien, a native and citizen of Israel and a Greek Orthodox Christian, challenged the Immigration Judge's finding that he did not show that the Israeli government acquiesced to any torture by Muslims in Israel and the denial of CAT relief. The Board affirmed the Immigration Judge's decision, finding no showing of either a likelihood of torture by Muslims or acquiescence to such torture by the Israeli Government. Citing *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002), the court reiterated that that the proper inquiry for "acquiescence" is "willful blindness," or whether public officials "would turn a blind eye to torture." *Id.* However, "[r]equiring that government officials 'willfully accept[]' torture is inconsistent" with the Senate Committee on Foreign Relations' Statement that "'willful blindness' satisfies the statutory [acquiescence] standard." *Id.* In rejecting the willful acceptance test, the court joined the Sixth and Ninth Circuits in modifying *Matter of S-V-*, 22 I&N Dec. 1306, 1312 (BIA 2000). The court then granted the alien's petition for review for the Board to apply the "actual knowledge" or "willful blindness tests."

Sixth Circuit

Amir v. Gonzales, 467 F.3d 921, 927 (6th Cir. 2006).

In vacating the Board's decision and remanding for further review, the court rejected the Board's *Matter of S-V-* willful acceptance test, holding that it "conflicts with Congress' clear intent to include 'willful blindness' in the definition of acquiescence." *Id.* (citations omitted). The alien, a native and citizen of Indonesia and a Christian, alleged that Muslim extremists firebombed his church, broke into his car, and chased him in the parking lot of a church while wearing white robes and wielding Samurai swords. The Immigration Judge denied the alien's CAT application because he "did not show that the Indonesian government was willfully accepting of the fanatical Muslim activity." *Id.* Rejecting the Board's willful acceptance test, the court vacated the Immigration Judge's CAT decision and granted the petition for review.

Seventh Circuit

Cf. Lozano-Zuniga v. Lynch, 832 F.3d 822, 831 (7th Cir. 2016) (affirming the denial of CAT where the Board used the "willful blindness" standard, but not ruling on the issue).

N.L.A. v. Holder, 744 F.3d 425, 442 (7th Cir. 2014) (citing the willful blindness standard favorably).

Eighth Circuit

Khrystotodorov v. Mukasey, 551 F.3d 775, 782 (8th Cir. 2008) ("A government's 'willful blindness toward the torture of citizens by third parties' amounts to unlawful acquiescence"); *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 n. 3 (8th Cir. 2009) (same).

Ninth Circuit

Madrigal v. Holder, 716 F.3d 499, 509 (9th Cir. 2013) (citations omitted).

"Although the public official must have 'awareness' of the torturous activity, he need not have actual knowledge of the specific incident of torture. Acquiescence also does not require that the public official approve of the torture, even implicitly. It is sufficient that the public official be aware that torture of the sort feared by the applicant occurs and remain willfully blind to it."

Cole v. Holder, 659 F.3d 762, 771 (9th Cir. 2011) ("Acquiescence by government officials 'requires only that [they] were aware of the torture but "remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it."'" (quoting *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008)).

Aguilar-Ramos v. Holder, 594 F.3d 701, 705-06 (9th Cir. 2010) (granting the alien's petition for review and remanding for further consideration of the alien's CAT claim where the Board improperly construed the acquiescence element as requiring "actual knowledge or willful acceptance of torture [because] awareness and willful blindness will suffice" and the record indicated "that gangs and death squads operate in El Salvador, and that its government is aware

of and willfully blind to their existence" (citing *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003)).

Bromfield v. Mukasey, 543 F.3d 1071, 1079 (9th Cir. 2008).

The Immigration Judge rejected the alien's CAT claim because he had not demonstrated that he was at risk of harm from the Jamaican government. The court held that this conclusion was legally erroneous because the alien "was not required to show that the government would torture him; he could satisfy his burden by showing that the government acquiesces in torture of gay men." *Id.* (citing 8 C.F.R. § 1208.18(a)(1)). "'Acquiescence' requires only that public officials were aware of the torture but 'remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.'" *Id.* (quoting *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006)). The court additionally held that the record compelled the conclusion "that the Jamaican government not only acquiesces in the torture of gay men, but is directly involved in such torture. The government criminalizes homosexual conduct, making it punishable by up to ten years in prison. This is an indicator of the government's position toward gay men, as is the fact that the police generally do not investigate complaints of human rights abuses suffered by gay men. Moreover, the Country Report further indicates that police officers and prison wardens are directly responsible for a portion of these abuses." *Id.*

Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1059 (9th Cir. 2006) ("Because 'sanction' connotes greater volition and approbation than 'acquiescence,' 'awareness,' 'willful blindness,' and even 'willful acceptance,' the [Immigration Judge] used a higher legal standard to assess [the alien's] CAT claim than is permitted under the law.").

Zheng v. Ashcroft, 332 F.3d 1186, 1188, 1194 (9th Cir. 2003).

The aliens claimed that if he was returned to China he would be killed by the smugglers who brought him to the United States because he reported the names of the smugglers to the American government. *Id.* at 1188. The alien asserted that the Chinese government will not protect him because public officials are connected to the smugglers. The Immigration Judge granted the alien's application for CAT after finding that he had "established a clear probability of torture and that there is [a] sufficient nexus between the [Chinese] public officials" and the smugglers. *Id.* The Board reversed and held, in reliance on *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000), that the alien had not demonstrated that government officials "are willfully accepting of" the torturous activities of a third party. *Id.* "The BIA found that, even assuming Chinese government officials knew about the smuggling operations and failed to stop them, [the alien] did not show that government officials would acquiesce in harm that rises to the level of torture." *Id.*

The court reversed, concluding that the Board's "interpretation of the term acquiescence to require that [the alien] must prove that the government is 'willfully accepting of' torture, instead of proving that public officials are aware of the torture, impermissibly narrows Congress' clear intent in implementing relief under the Convention Against Torture." *Id.* at 1194. "The correct

inquiry as intended by the Senate is whether a respondent can show that public officials demonstrate 'willful blindness' to the torture of their citizens by third parties, or as stated by the Fifth Circuit, whether public officials 'would turn a blind eye to torture.'" *Id.* at 1196. To the extent that the Board held otherwise, the court concluded, those decisions were not entitled to deference. *Id.* The court therefore remanded the case to give the Board "the first opportunity to apply the correct standard of 'acquiescence' as intended by the Senate in ratifying the Convention." *Id.* at 1197.

Tenth Circuit

Karki v. Holder, 715 F.3d 792, 806-07 (10th Cir. 2013).

The Immigration Judge and the Board concluded that the alien was not entitled to relief under the CAT because he had not demonstrated that government officials would be likely to acquiesce in his torture by Maoists upon his return to Nepal. The alien challenged this determination, alleging that neither the Immigration Judge nor the Board considered relevant record evidence indicating that Maoists won a plurality of seats in the 2008 elections in Nepal, installed a Maoist prime minister, and proclaimed Nepal a federal democratic republic. The report indicates that "Maoists frequently employed arbitrary and unlawful use of lethal force, including torture and abduction." *Id.* at 806. Furthermore, "[d]uring [2008] Maoists committed 141 acts of torture . . . . The government failed to conduct thorough and independent investigations of reports of security force or Maoist/[Maoist-affiliated Youth Communist League] brutality and generally did not take significant disciplinary action against those involved." *Id.* Further, Maoists continued to look for the alien and have placed him on their "black list, which makes him likely to be killed or maimed by the Maoists if he returns to Nepal." *Id.*

The court rejected the government's argument there was no evidence that the Nepalese government has enough information about the alien's situation to be willfully blind to any possible torture, since he admitted he did not inform government authorities of his fear of harm from the Maoists. *Id.* at 806-07. The court characterized this argument as "essentially transform[ing] the willful blindness standard into an actual knowledge requirement." *Id.* at 807. Because the alien had presented evidence that the government is aware of and does not prevent the Maoists' frequent acts of torture, he need not present evidence that the government knows of the specific threat against him in order to show that the government would likely turn a blind eye to his torture if he returned to Nepal. The court rejected the government's argument that this case was analogous to its decision in *Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005), after the court concluded that this case is distinguishable: "There, the [aliens] faced a threat from a particular individual, and there was no evidence that public officials were aware of or had acquiesced in any previous acts of torture by this individual or his employees. Under those circumstances, the fact that the [aliens] had not informed the government of the individual's threats against them prevented the conclusion that the government would acquiesce in whatever actions the individual took against them." *Id.* According to the court, the alien's "evidence that the [Napelese] government regularly fails to take action to prevent or punish Maoist acts of torture makes this a very different case."

Cruz-Funez v. Gonzales, 406 F.3d 1187, 1192 (10th Cir. 2005).

The aliens petitioned for review with the Fourth Circuit, arguing that the Immigration Judge erred by concluding that they failed to show government acquiescence for purposes of CAT relief. The court noted that acquiescence of a public official requires that the public official, prior to the activity constituting the torture, have awareness of such activity and thereafter breach his or her legal responsibility to prevent such activity. It also noted that actual knowledge, or willful acceptance, is not required for a government to acquiesce to the torture of its citizens. Rather, willful blindness suffices to prove acquiescence. The court found that the alien did not show that any reasonable adjudicator would be compelled to find a connection between their purported torturer, a private individual, and the Honduran government, or awareness by any public official that this individual threatened the aliens' lives. The court concluded that any actions taken against the aliens would not be with the acquiescence of the Honduran government.

Eleventh Circuit

None

V. Acting in an Official Capacity

A. Color of Law

Fifth Circuit

Garcia v. Holder, 756 F.3d 885, 887-92 (5th Cir. 2014).

The alien petitioned for review of the Board's denial of withholding of removal and protection under CAT. After his deportation from the United States, the alien went to renew his Salvadoran identification card. *Id.* at 887. He gave officials his contact information and told them his identification had not been checked in a while because he had just returned from the United States. *Id.* at 887-88.

Subsequently, four men dressed in police uniforms with badges, carrying weapons, and wearing riot masks came to the alien's brother's house, where the alien was staying. *Id.* at 888. The alien said there was no way to tell if they were actually police or if they were criminals who had stolen police uniforms. One of the men told the alien he had to pay them $10,000 because he had returned to El Salvador from the United States. *Id.* One of the men put a gun in the alien's face and told him that he and his family would be murdered if he did not pay. *Id.*

After this encounter, the alien received a call telling him to go to a certain location where he would learn where to deposit the money. *Id.* After the phone call, the alien destroyed his cell phone, and left his brother's house. *Id.* The police returned to his brother's house to search for the alien. The police officers hit his brother in the chest and put a gun to his head. *Id.*

The alien relocated to another city in El Salvador. *Id.* One day, the alien was riding on a bus that was stopped at a checkpoint and the alien was asked for his national ID card. *Id.* The police asked why he was in Usulután, El Salvador, when his ID card said that he lived in San Salvador, and then made a phone call and gave the alien's name to someone on the other end of the line. *Id.* Later when the alien was walking home from work in Usulután, four men got out of a car and beat him so brutally that he was hospitalized for a week. *Id.* The alien heard one of the men say that the beating was for the unpaid money. *Id.*

The court remanded for further consideration of the state action prong of the CAT analysis. The court adopted the Attorney General's interpretation of the phrase "acting in an official capacity" to mean acting under color of law and said it would interpret this term as it would in a civil rights context. *Id.* at 891 (citing *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270, 285 (A.G. 2002)). The court explained that government acquiescence need not be officially sanctioned action; "instead, an act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* Thus, actions motivated by an officer's personal objectives are "under color of law" when the officer uses his official capacity to further those objectives. *Id.* at 892.

The court stated that the alien was not basing his claim on the possible willful blindness of government officials; he instead was asserting that government officials were previously involved in or enabled the extortion and beating and are likely to be involved again in the future. *Id.* at 892-93. The court therefore remanded because it found that the "alleged active involvement of public officials acting in their official capacity and the close temporal proximity between [alien's] contact with public officials and the subsequent threats and beatings," could support an acquiescence finding. *Id.* The petition for review granted in part, denied in part, and the case was remanded.

Eighth Circuit

Ramirez-Peyro v. Holder, 574 F.3d 893, 895-98, 902-05 (8th Cir. 2009).

The alien petitioned for review of the Board's denial of protection under the CAT. The alien was involved in the Mexican drug-trafficking trade, but became a confidential informant for Immigration and Customs Enforcement ("ICE"). *Id.* at 895. He infiltrated a Mexican drug cartel on ICE's behalf and testified that he witnessed Mexican police officers murder people at the cartel's request, saw cartel members kill many others in the presence of Mexican police officers, and witnessed police covering up the crimes. *Id.* The alien helped the United States government arrest approximately fifty people, including a top cartel leader. *Id.*

The alien's work as an informant led to two attempts on his life. *Id.* The United States paroled the alien into the country and placed him in protective custody after the second attempt on his life. *Id.* at 896. When the alien's parole expired, he was placed into expedited removal proceedings. *Id.*

The Board reversed the Immigration Judge's decision to grant protection under CAT, concluding that the alien did not show that the torture would be the result of Mexican government officials "acting in an official capacity" or "under color of law." *Id.* at 898. The court rejected the Board's determination that government officials' consent or acquiescence would "not be . . . under the pretense of law" because there was no relationship between an officer's collusion with a drug cartel and such officer's duties as a police officer. *Id.* In so doing, the court rejected the Board's definition of action "under color of law" as an action "where a public official possesses the authority or something akin to but broader than 'apparent authority' to act . . . but exceeds such authority in a given case, even where the excessive nature of the action is so great as to constitute a crime." *Id.*

The court found that the Board narrowly defined "under color of law" and disregarded the Immigration Judge's findings that law enforcement officials could use their positions to learn of the alien's location and reveal that information to the cartel, thereby allowing the cartel to intercept and hurt him. *Id.* at 902. The court determined that the Board similarly ignored the Immigration Judge's finding that Mexican officials would have information about the alien's return if he went through the normal deportation procedures—information only obtainable because of their government positions—and, using that information, would make the alien's location known to the cartel. *Id.*

The court cautioned that a lawful arrest is only one of several possible circumstances that could impart color of law to the actions of the officers who might harm the alien. *Id.* The court highlighted the analogous facts in *United States v. Price*, 383 U.S. 787, 790 (1966), wherein a deputy sheriff released three prisoners in the middle of the night and followed them as they left the jail. *Id.* at 903. The deputy sheriff then intercepted the men and drove them in his police car to a location where he, two other police officers, and fifteen private individuals murdered them. *Id.* In that case, the Supreme Court held that each person involved in the murders was acting under color of law because their actions were made possible by the state detention and the police officer's calculated release of the victims. *Id.* The court distinguished cases where there was no evidence that the abuse was common among government officials and no evidence that the officer's official capacity provided him with the means by which to find, access, and/or harm the alien. *Id.* at 903-04 (citing *Miah v. Mukasey*, 519 F.3d 784 (8th Cir. 2008)).

The court also stated that because the law enforcement officials' jobs are to prevent the type of harm that the alien feared, a failure to act in response to impending torture "almost necessarily implies that the acquiescence will occur in an official capacity." *Id.* at 905. The court found that this case was different from cases where the government merely was unable to control private actors despite concerted attempts because of the extensive police participation in actions on behalf of the cartel (even while the police are not on duty), their return to work after participating in such harmful actions (with the return to their status as government officials and their duty to stop the type of behavior in which they themselves engaged), and the government's general knowledge of the actions. *Id.* The petition for review was granted and the case was remanded.

Ninth Circuit

Baghdasaryan v. Holder, 592 F.3d 1018, 1020-21, 1024-26 (9th Cir. 2010).

The alien, a citizen of Armenia, petitioned for review of the Board's denial of asylum, withholding of removal, and protection under CAT. The alien was threatened, harassed, fined, detained, and beaten because he filed complaints with a judge and organized rallies and strikes opposing the endemic government corruption perpetrated by a powerful politician and government official. *Id.* at 1020-21.

The court determined that the alien was a whistle-blower whose opposition to the powerful politician and government official's corruption qualified as a political opinion. *Id.* at 1024. The court noted that the alien opposed and publicly criticized the extortion scheme, filed a complaint with a judge, organized other business owners to fight the extortion, and held several rallies and strikes to publicize the corruption. *Id.* The court stressed that where "a government official uses the resources of his office to extort bribes from many people, he is engaged in more than aberrational conduct." *Id.*

Finally, the court concluded that the government was responsible for the harm because the alien was maltreated by not only the powerful politician, but also by officials from the militia, National Security Service, the tax authority, and criminal investigators who were acting under color of law rather than in their individual capacities. *Id.* at 1025-26. The petition for review was granted and remanded.

Board

Matter of Y-L-, A-G-, & R-S-R-, 23 I&N Dec. 270 (A.G. 2002) ("The scope of the Convention is confined to torture that is inflicted under color of law. It extends to neither wholly private acts nor acts inflicted or approved in other than 'an official capacity.'" (quoting *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001)).

B. Rogue Officials

First Circuit

Costa v. Holder, 733 F.3d 13, 14–15, 17–18 (1st Cir. 2013).

The alien, a native and citizen of Brazil, had been working as an informant for ICE, helping to identify sellers of fraudulent immigration documents. *Id.* at 14. The alien began receiving threatening phone calls. *Id.* at 15. Her mother and sisters in Brazil also began receiving threatening calls. *Id.* Two Brazilian police officers, including one whose brother had been arrested in the United States for selling fraudulent documents as a result of the alien's work as an informant, visited the alien's mother's house and said they would find the alien if she returned to Brazil. *Id.* When the alien's female cousin returned to Brazil, police officers returned to her

mother's house and inquired if the alien had returned to Brazil. *Id.* The alien began avoiding ICE agents because she was afraid of these calls and threats, so ICE arrested her and attempted to reinstate her prior removal order. *Id.*

The court determined that the alien faced a risk of harm arising solely out of a personal dispute, noting that the Board distinguished between persecution from a shared experience and persecution that is wholly personal, despite involving a characteristic shared with others, citing *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). *Costa*, 733 F.3d at 17. The court concluded that the dispute was personal because, although the alien participated in multiple sting operations, only the arrest of the police officer's brother triggered threats and the evidence concerning the police officer's visits to the alien's mother to deliver the threats suggested the scope of threats did not extend beyond a personal vendetta or beyond the police immediately involved. *Id.* The court also denied protection under CAT, noting that although there was a high level of police abuse and impunity in Brazil, there were also investigations and prosecutions of corrupt police officers and the government had cracked down on corruption. The court concluded that the evidence did not provide a sufficient basis to overturn the Board's determination that "the actions of two rogue police officers do[] not constitute government action." *Id.* at 18. And the inference that a larger group of officers were willing to help the officers who threatened the alien was not inevitable. *Id.*

Romilus v. Ashcroft, 385 F.3d 1, 3-4, 9 (1st Cir. 2004).

In support of his CAT application, the alien testified about four incidents in which he suffered harm. *Id.* at 3-4. The first two incidents involved an oral agreement he made with a military officer to care for and share the profits from the sale of a cow. The military officer's later failure to share the profits from the sale was followed by two physical confrontations between the two men, with the officer assaulting the alien on two occasions. The alien had no contact with the officer after these two incidents. The third incident occurred when armed men dressed in civilian clothes broke into his house while he and his wife were asleep robbed them at gun point and left. The fourth incident involved a beating the alien experienced at the hands of unidentified, masked attackers during a meeting of a democratic organization of which the alien was a member.

According to the Immigration Judge, only two of the incidents were involved a government official, namely, the military officer, and this officer was not acting in an official capacity when he assaulted the alien because "these incidents sprang from a personal dispute." *Id.* at 9. Although the alien's expert testimony and documentary evidence established that the Haitian government sanctions attacks on groups, such as the alien's democratic organization, the court found that the alien could not meet his burden of proof for CAT on this basis since none of this evidence was specific to the alien or his particular organization. Moreover, the alien's expert witness was unable to identify which groups, if any, might be interested in persecuting the alien upon his return to Haiti, and she could not say for certain whether or not these groups were connected to the government. Based on this record, the court affirmed the denial of the alien's application for protection under the CAT.

Second Circuit

Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004), *amended.*

The alien fled Egypt after being accused of murder. Citing evidence that the police routinely torture, suspected criminals to extract confessions, the alien claimed that the Egyptian police would torture him if he is returned to Egypt to extract a confession. The Board, which had previously affirmed granting the alien CAT relief, reversed itself upon reconsidering its decision. The Board found that the alien feared prosecution and a lawful sanction for his alleged crime. The court disagreed with the Board's reasoning, noting that the use of torture to extract a confession to a crime was not a lawful sanction as contemplated under the CAT. Furthermore, the court observed that "[t]o the extent that the Egyptian police are acting in their official capacities—as is strongly suggested by the fact that their goal is to extract confessions—then the acts are carried out 'by . . . a public official . . . acting in an official capacity.'" *Id.* (quoting 8 C.F.R. § 1208.18(a)(1)). Moreover, even if "these police are acting in their purely private capacities, then the 'routine' nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it." *Id.*

Third Circuit

None

Fourth Circuit

Suarez-Valenzuela v. Holder, 714 F.3d 241 (4th Cir. 2013).

The alien, a citizen of Peru, petitioned for review of the Board's denial of withholding of removal under CAT. The alien appeared on a Peruvian talk show. *Id.* at 243. He was promised items in exchange for appearing on the show, but never received them. When the host refused to provide the items, the alien and the show's investigator threatened to report the host to another TV station. *Id.* Then four men with weapons and police badges, including one named Luis who worked for the show's host, approached and began arguing with the investigator and the alien. *Id.* Luis hit the investigator with his gun, causing the investigator to fall, seriously injure his head, and die. *Id.* Luis then shot the alien in the foot. *Id.* During the alien's 2-week stay in the hospital following the altercation, police officers offered him money to keep quiet about the shooting. *Id.* The alien refused and told the authorities that Luis killed the investigator. He also agreed to testify at Luis's murder trial. *Id.* Several months before the trial, Luis stabbed the alien in the chest in an attempt to prevent him from testifying. *Id.* The alien ultimately testified against Luis anyway. *Id.* Luis was convicted and sentenced to 15 years' imprisonment, but only served 3 months of that sentence. *Id.*

After his release, Luis went to the alien's mother's house to find the alien, and destroyed the house. *Id.* The alien was staying at his grandmother's house, but feared for his safety because

he thought the police could use a national identity database to locate him anywhere in Peru. *Id.* After the alien left Peru, Luis visited the alien's mother and father and threatened to kill the alien several times. *Id.* at 244.

The alien contended that the Board incorrectly applied the "willful acceptance" standard (which requires that the alien demonstrate that government officials had actual knowledge of his or her torture), which had been discredited by the Fourth Circuit, rather than the "willful blindness" standard (which allows the alien to show acquiescence when government officials have actual knowledge of or "turn a blind eye to torture"). *Id.* at 245–46. The court concluded that the Board did not impose an actual knowledge requirement. Instead, the Board assessed whether the alien's attacker was likely to repeat his behavior and whether the government was likely to turn a blind eye to the torture. *Id.* at 246. Thus, the Board's decision was consistent with the willful blindness standard. *Id.*

The court agreed with the Board that the Peruvian government was not complicit in the alien's past torture and was unlikely to acquiesce to any future torture. *Id.* at 248. In finding that the alien had not established that the government acquiesced to Luis's behavior in the past or would do so in the future, the Board cited the following: First, although the Board acknowledged that the officers who helped Luis may have acquiesced to the harm by failing to intervene, the Board judged these officers to be "rogue" because other government officials condemned Luis's behavior by prosecuting, convicting, and imprisoning him. *Id.* Moreover, Luis tortured the alien to keep him from testifying, suggesting that he feared the government would punish him and did not act with government approval. *Id.* Lastly, the Board noted that the alien had not demonstrated that Luis remained a government employee after his imprisonment. *Id.* The petition for review was denied.

Fifth and Sixth Circuits

None

Seventh Circuit

Mendoza-Sanchez v. Lynch, 808 F.3d 1182, 1183-85 (7th Cir. 2015).

Members of a Mexican drug cartel accused the alien, a native and citizen of Mexico, of cooperating with United States law enforcement and threatened to kill him if he returned to Mexico. *Id.* at 1183. Cartel members told the alien that the cartel knew where in the country he had grown up, and the alien presented evidence that the cartel is "not confined to a State or a small area but its reach is nationwide," and that the "law enforcement agencies are infiltrated by the Cartels." *Id.* The State Department's human rights report on Mexico, which he also submitted, detailed the widespread corruption of Mexican police and their routine participation in the activities of drug organizations. *Id.* While the Immigration Judge found the respondent to be credible, he determined that the respondent had not established his eligibility for CAT relief. *Id.* at 1184. The Board affirmed, concluding that the alien had not "presented sufficient evidence

to establish that . . . a Mexican public official would acquiesce (or be willfully blind) to such harm." *Id.*

The Seventh Circuit reversed. The court noted that the record shows that "police officers routinely collaborate with and protect drug cartels in Mexico and . . . despite some arrests for corruption, widespread impunity for human rights abuses by officials remained a problem in both civilian and military jurisdictions. . . ." *Id.* The court further noted that "[s]ecurity forces, acting both in and out of the line of duty, arbitrarily and unlawfully killed several persons, often with impunity," and "[t]here were multiple reports of forced disappearances by the . . . police'"; "'authorities routinely failed to conduct thorough and expeditious searches and investigations in disappearance cases"; "there were credible reports of police involvement in kidnappings for ransom" and "frequent reports of citizens . . . beaten, suffocated, tortured with electric shocks, raped, and threatened with death in the custody of arresting authorities." *Id.*

Emphasizing police involvement in drug cartel activities, the court explained that the reports show that "police, particularly at the state and local level, were involved in kidnapping, extortion, and providing protection for, or acting directly on behalf of, organized crime and drug traffickers . . . . Local forces in particular tended to be poorly compensated and directly pressured by criminal groups, leaving them most vulnerable to infiltration." *Id.* One report describes an incident in which "members of a Mexico City drug gang kidnapped and killed . . . victims in retaliation" for violence committed against a member of the gang, and the suspects "includ[ed] four police officers." *Id.* The court finally determined that "the presence of the Mexican army in Matamoros supports rather than undermines [the alien's] claim that local police will acquiesce in his torture; had the police been protecting the city, the army would have had no reason to be there." *Id.* at 1185.

Based on this record, the court concluded that "[e]vidence that Mexican police participate as well as acquiesce in torture is found in abundance in this case." *Id.* at 1185. The court found that it was irrelevant if these officers are "rogue officers" compensated by the cartel to engage in isolated incidents of torture rather than evidence of a broader pattern of acquiescence in torture. *Id.* And no evidence had been "presented that the Mexican government can protect the citizen from torture at the hands of local public officials or to which local public officials are willfully blind." *Id.* (citing *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1137–38 (7th Cir. 2015) (holding that a government's success in controlling drug cartels, rather than its efforts in this regard, "bears on the likelihood of a person's being killed or tortured if removed to Mexico"). As result, the court remanded the case to the court for further proceedings.

Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1138-39 (7th Cir. 2015).

The alien feared that cartels would kill him in Mexico, and the court found that the police collude with the cartels and perpetrate violent acts on the cartels' behalf with impunity. Based on this record, the court reversed the Immigration Judge's denial of CAT. The court first found that the Immigration Judge erred in denying CAT after finding that the alien had not shown that "Mexican government" had acquiesced in torture because the regulation merely requires

acquiescence by a public official or individual acting in an official capacity. *Id.* at 1139 ("That Mexican police participate as well as acquiesce in the torture of the [the alien] is evidenced by the torture that police have already inflicted on [him], an atrocity consistent with the widespread understanding that many Mexican police are allied with the big drug cartels, such as the Zetas."). Second, the court found it irrelevant that the police officers were "rogue officials" because the alien "did not have to show that the entire Mexican government is complicit in the misconduct of individual police officers." *Id.* Third, the court held that it was irrelevant that the Mexican government was "trying," with little success, to control cartel violence. *Id.* (citing also *Madrigal v. Holder*, 716 F.3d 499, 509-10 (9th Cir. 2013) (concluding, in a case involving the Zetas cartel, that "if public officials at the state and local level in Mexico would acquiesce in any torture [that the alien] is likely to suffer, this satisfies CAT's requirement that a public official acquiesce in the torture, even if the federal government in Mexico would not similarly acquiesce").

Accordingly, the court concluded that "[i]f the Mexican government could be expected to protect the [alien] from the Zetas should he be returned to Mexico, the risk that he would be tortured or killed might be too slight to entitle him to deferral of removal." *Id.* at 1140. However, "though the immigration judge remarked that the Mexican government was trying to control the drug gangs, it is success rather than effort that bears on the likelihood of the [alien's] being killed or tortured if removed to Mexico." *Id.* The petition for review was granted and the record was remanded.

Eighth Circuit

Miah v. Mukasey, 519 F.3d 784, 786-88 (8th Cir. 2008).

The alien, a citizen of Bangladesh, petitioned for review of the Board's denial of asylum, withholding of removal, and protection under CAT and the Board's subsequent denial of his motion to reopen. The alien, allegedly an active member of the Bangladesh National Party ("BNP"), was kidnapped and beaten by members of another party during a rally. He was released the same day, was not injured, and did not file a police report. *Id.* at 786. The alien also claimed to have a well-founded fear of future persecution by a ward commissioner who tried to seize two of the alien's parcels of land by threatening and beating the alien's family members and servants. *Id.* at 787. The ward commissioner was the head of a criminal gang and an active leader of the ruling BNP. *Id.* The alien's father has tried to thwart the commissioner's efforts to take the land by using the Bangladeshi courts, but has been unsuccessful. *Id.*

With regard to CAT, the court upheld the Board's determination that there was no government acquiescence to torture because, although the ward commissioner was an elected official, his rogue efforts to take other people's property fell outside of his official duties, and in any event, the Bangladeshi government's efforts to investigate and prosecute him for his illegal activities weighed against a finding that the government would consent or acquiesce to torture in the future. *Id.* The petitions for review were denied.

Ninth Circuit

Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1076, 1079-80 (9th Cir. 2015).

The alien, a transgender female, experienced rape and other abuse at the hands of family, schoolmates and teachers as child. She entered the United States unlawfully and was ordered removed and reentered the United States after two incidents. During the first, four "armed uniformed police officers stationed at a roadside checkpoint" called derogatory names while she was walking down the street. They followed her kidnapped her, beat her, and raped her. *Id.* at 1076. After the assault, the four armed officers "told her that they knew where she lived and would hurt her family if she told anyone about the attack." *Id.* This incident prompted the alien to flee to the United States. While attempting to enter this country, the alien encountered a group of Mexican military officers, one of whom forced her to perform oral sex on him and then told her to get out of his sight. *Id.* The Board denied the alien's CAT claim, concluding that she had failed to "demonstrate[] that a member of the Mexican government acting in an official capacity will more likely than not 'consent' to or 'acquiesce' in her torture; that is, come to have advance knowledge of any plan to torture or kill her and thereafter breach her legal responsibility to intervene to prevent such activity." *Id.* at 1077.

The court disagreed with the Board's conclusion in this regard, noting that the alien had provided credible testimony that she was severely assaulted by uniformed on-duty police officers in Mexico. *Id.* at 1079. Thus, the Board had "erred by requiring [the alien] to also show the 'acquiescence' of the government when her torture was inflicted by public officials themselves, as a plain reading of the regulation demonstrates." *Id.* The court also rejected "the government's attempts to characterize these police and military officers as merely rogue or corrupt officials. The record makes clear that both groups of officers encountered, and then assaulted, [the alien] while on the job and in uniform." *Id.* at 1080. The court held that an alien is "not required to show acquiescence by a higher level member of the Mexican government. It is enough for her to show that she was subject to torture at the hands of local officials. Thus, the [Board] erred by finding that [the alien] was not subject to past torture by public officials in Mexico." *Id.* (citing *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013)).

Tenth Circuit

None

Eleventh Circuit

Unpublished

Vargas Hidalgo v. U.S. Att'y Gen., 154 F. App'x 827, 829 (11th Cir. 2005) (holding that the aliens did not show government acquiescence to threats of torture by criminals, and stating that to the extent that government officials were involved, they were rogue employees not complying with governmental instructions).

VI. Government Actions Establishing Lack of Acquiescence

First Circuit

Granada-Rubio v. Lynch, 814 F.3d 35, 37-38, 40 (1st Cir. 2016).

Gang members threatened the alien, a native and citizen of El Salvador, informing her that she must pay them "rent" or she and her children would be harmed. *Id.* at 37-38. The alien testified that the police sometimes take part in such threats and schemes to extort money from people. *Id.* at 40. She also stated that "sometimes [the police] will report things that have been said to them because they're also afraid. . . . Sometimes they just don't help you." *Id.* The country report states that there have been complaints of torture and "cruel, inhumane, or degrading treatment or punishment perpetrated by public officials," and that the government of El Salvador has not effectively implemented the criminal penalties for public corruption. However, the court found that neither this testimony, nor the country report is sufficient to support a claim of government acquiescence to torture.

Aldana-Ramos v. Holder, 757 F.3d 9, 12-14, 19 (1st Cir. 2014), *amended.*

The aliens reported to Guatemalan authorities that gang members had kidnapped their father, a successful businessman. *Id.* at 12-13. However, the aliens testified that the police took no action. Even though the aliens gathered the requested ransom, their father was murdered. Police called them and told them that his body was discovered in another town. *Id.* at 14. The police investigated their father's murder and arrested and charged several suspects. The charges were later dropped and the suspects were released because, according to the male alien, the presiding judge was bribed. The Board rejected the aliens' claim for CAT protection because there was no evidence of government acquiescence. *Id.* at 19. The court agreed, noting that, even though they did not respond after their father's kidnapping, the police did investigate his murder and made arrests in the case. Although the male alien presented evidence that the judge who released the suspected gang members from custody had been bribed, the aliens "have made no showing that similar bribery would likely occur in a future case." *Id.*

Cantarero v. Holder, 734 F.3d 82, 87–88 (1st Cir. 2013).

In denying the alien's CAT claim, the Board agreed with the Immigration Judge that he presented insufficient evidence that he would more likely than not be tortured at the direction of, or with the acquiescence of government officials. *Id.* at 87. In rejecting the alien's argument that the government of El Salvador is unable to protect those who are harmed by gangs, the Immigration Judge credited evidence that the government is actively seeking to curb gang violence. Quoting *Mayorga-Vidal v. Holder*, 675 F.3d 9, 20 (1st Cir. 2012), the court noted that "El Salvador's efforts at managing gang activity have not been completely effectual does not compel a conclusion that the government has acquiesced in gang activities." *Cantarero*, 734 F.3d at 87. Finally, the court stated that, even though the record reveals that some police officers

have mistreated detainees, such officers "were arrested for their actions, expelled from the police force, or otherwise held responsible for their misconduct." *Id.* at 88. Accordingly, the court affirmed the Board's decision to deny the alien's application for CAT relief.

Amouri v. Holder, 572 F.3d 29, 35 (1st Cir. 2009).

The alien, a native and citizen of Algeria, argued that the Immigration Judge erred in denying his application for protection under the CAT. In support of his CAT claim, the alien cited various State Department country conditions reports, reflecting that "Algeria is a haven for terrorists and wracked by random violence." *Id.* While the court noted that country conditions reports are generally authoritative, the country reports do not necessarily override the alien's actual experiences nor the case-specific evidence presented in each particular case. *Id.* (citing *Zarouite v. Gonzales*, 424 F.3d 60, 63-64 (1st Cir. 2005)).

Thus, despite the fact that the country conditions reports indicate that Algeria is wracked with generalized violence inflicted by terrorists, the court found that there is no evidence "that the government either participates or acquiesces in this violence." *Id.* In fact, the case-specific facts in this particular case indicated the opposite to be true. The court observed that "[a]fter the armed men visited the [alien's] shop, the police came to his aid. They agreed to investigate the matter and gave him safety tips. When, thereafter, his store burned down, the police again responded and carried out an investigation." *Id.* Based on this record, the court concluded that the Immigration Judge properly denied the alien's claim for CAT relief.

Burbiene v. Holder, 568 F.3d 251, 253-54, 255-56 (1st Cir. 2009).

The alien claimed that she would be abducted and forced into prostitution if she was removed to Lithuania. *Id.* at 253-54. The court agreed with the Immigration Judge's conclusion that the Lithuanian government is "making every effort to combat" human trafficking, "a difficult task not only for the government of Lithuania, but for any government in the world." *Id.* at 255. The country report indicates that legislative changes enacted in 2005 strengthen the government's response to trafficking, such as increased criminal sentences for traffickers. It also reports that a joint government task force uncovered an organized crime ring that had transported nearly 100 young girls and women to work in the sex trade abroad, and the government opened dozens of criminal cases against alleged traffickers. Further, according to the report, the government provided funding for shelters to assist trafficking victims and provided funds NGOs serving such victims. While the court acknowledged that the government has not "completely eradicate[d] the problem of human trafficking within its borders, and that the problem persists despite . . . 'significant efforts'[,] . . . . the record does not indicate that Lithuania's inability to stop the problem is distinguishable from any other government's struggles to combat a criminal element." *Id.* However, according to the court, such setbacks in its fight against traffickers, do not establish that the government consents or acquiesces in the human trafficking problem in Lithuania. *Id.* at 255-56.

Usman v. Holder, 566 F.3d 262, 269 (1st Cir. 2009).

The court rejected the alien's argument that the Pakistani government had "effectively given its consent" for the harm he suffered at the hands of Islamic fundamentalists. *Id.* The court agreed with the Immigration Judge's assessment that, based on the country conditions report, the Pakistani government has "been active in attempting to suppress Islamic extremists" within its borders. *Id.*

Limani v. Mukasey, 538 F.3d 25, 32 (1st Cir. 2008).

The court upheld the Board's decision to deny the aliens' application for CAT relief because they "provided no evidence of past acts that rise to the level of torture nor have they shown any likelihood of future torture that would be inflicted by a 'public official or other person acting in an official capacity.'" *Id.* While the aliens claimed that they would be tortured in the future by Islamists, who have infiltrated the military and police in Algeria, the court concluded that the documentary evidence belies this claim, indicating that the government and the Islamists they fear are "engaged in a protracted war," and one of the alien's described "a government raid against extremists" in his testimony. *Id.* Further undermining the aliens' claim, the affidavit the male alien submitted indicated that extremists view the police as "the enemy." *Id.*

Toure v. Ashcroft, 400 F.3d 44, 50-51 (1st Cir. 2005) (rejecting the alien's claim that she will be subjected to female genital mutilation ("FGM") at the consent of, or by or with the acquiescence of a public official or an official acting in an official capacity in Guinea, because FGM is illegal in Guinea, the Guinean Supreme Court intends to propose a constitutional amendment prohibiting FGM, and several high-level government officials have spoken out against FGM).

Njenga v. Ashcroft, 386 F.3d 335, 337 (1st Cir. 2004).

The alien, a native and citizen of Kenya, claimed that she would be tortured by the Mungiki criminal organization because her family used to be involved with that group and that the Mungiki would force her to undergo FGM. In response to a request from the Immigration Judge, the United States Department of State ("DOS") submitted an advisory letter pertaining to the Mungiki. The letter averred, among other things, that: (1) the DOS "has seen no reports of anyone being threatened with harm for leaving the Mungiki"; (2) the DOS "is unaware of any incident of anyone being harmed because of his or her relative's affiliation with the Mungiki"; (3) the Mungiki "are not present throughout [Kenya]"; (4) "government action against the Mungiki generally is against members who were engaged in some form of public, and at times disorderly, action"; and (5) the DOS "is unaware of any case in which the Mungiki have forced a woman to undergo FGM." *Id.* at 337. The court found that this letter indicates that it is unlikely that the alien will be tortured if removed to Kenya "by or at the instigation of or with the consent or acquiescence of a public official." *Id.* at 340.

Second Circuit

None

Third Circuit

Ordonez-Tevalan v. Att'y Gen. of U.S., No. 15-2187, 2016 WL 5122358, at *8-9 (3d Cir. Sept. 21, 2016)

The aliens, mother and son, fled from Guatemala after the female alien suffered abuse and rape at the hands of her boyfriend. The court held that the alien was not entitled to protection under the CAT because there is no evidence in the record that she was subjected to abuse "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* at *8 (quoting 8 C.F.R. § 1208.18(a)(1)). "To the contrary, [the record reflected] that the local government and other members of her community did not condone any abuse and, in fact, offered her assistance." *Id.* The court also dismissed the male alien's appeal of the Board's denial of CAT relief because "there is no evidence that it is 'more likely than not' that he would be 'tortured' if returned to Guatemala. Rather, the record demonstrates that the local government officials do not condone domestic violence and that his older brothers remain in Guatemala unharmed." *Id.* at *9.

Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 611-12 (3d Cir. 2011) (affirming the Board's determination that the alien had not shown he would be tortured by gangs with the acquiescence of the Honduran government because media reports show that the "government seeks to combat the [gang] problem and protect its citizens," and, although alien purportedly never saw progress in the Honduran police's investigation of his complaints, that did not mean that the police were not taking measures to deal with the gang problem).

Lukwago v. Ashcroft, 329 F.3d 157, 182-83 (3d Cir. 2003) (concluding that the Ugandan government did not initiate, conduct, or acquiesce in child enslavement and conscription by guerillas, but in fact opposed guerillas).

Fourth Circuit

Lizama v. Holder, 629 F.3d 440, 449–50 (4th Cir. 2011).

The alien asserted that financially well-off individuals such as himself are targeted by gangs for extortion, and those who resist gang recruitment, or generally oppose gangs, may face violent retribution and even death. *Id.* at 449. He also contends that the Salvadoran government is unable to protect its citizens from gang violence. *Id.* The court affirmed the denial of the alien's application for CAT because, although record evidence indicates crime and gang violence is pervasive in El Salvador, "[t]he Salvadoran government does not have a policy or practice of refusing assistance to persons who receive threats or are otherwise victims of gang violence." *Id.* On the contrary, "[m]uch of the government's current focus is fostering and providing greater

security for the public against gang violence." *Id.* at 449-50. In fact, the court noted, that the Salvadoran government's "strong-hand law enforcement policy" is having a "noticeable effect," at least in the short term, of curbing gang violence. *Id.* at 450.

Fifth Circuit

Ramirez-Mejia v. Lynch, 794 F.3d 485, 493-94 (5th Cir. 2015).

The alien alleged that she would be subjected to torture upon return to Honduras by the same people who killed her brother. *Id.* at 493. The alien feared harm at the hands of the gangs in Honduras, citing country reports discussing gang violence and police corruption in that country. She also claimed that her allegations that the police recommended against filing a report after her brother's murder, cautioning her "not to get involved with these people," and responded with indifference when she disclosed the arrested gang member's threats in 2006 and the anonymous notes in 2013. The Immigration Judge found that the alien did not show acquiescence to violence by the Honduran police, who in fact arrested a gang member and requested that she give a statement after the robbery of her father's business in 2006.

The court denied the alien's petition for review and affirmed the Board's decision that the Immigration Judge did not err in finding it not more likely than not that an official in Honduras would acquiesce in torture. *Id.* at 494. Although court acknowledged the alien's allegation that the police told her not to report her brother's murder, it noted that she did not allege that the police stated or otherwise indicated that they would permit harm to befall her if she did file a report. Additionally, she asserted that the police allowed her to be threatened by a gang member after the robbery of her father's business in 2006, but she acknowledged that the police arrested the gang member and insisted that she file a report against him. Finally, she alleged that officials advised her to leave the country when she disclosed the anonymous notes she had received. However, the court found that the officials did not express any intent to acquiesce in her torture if she did not leave.

Sixth Circuit

Alhaj v. Holder, 576 F.3d 533, 536-39 (6th Cir. 2009).

The court denied the alien's petition for review challenging the Board's affirming the Immigration Judge's denial of CAT protection. The alien who is a native and citizen of Yemen conducted a secret relationship with Ekhlas, the second wife of a local leader. Ekhlas had been forced to marry the local leader because his first wife was unable to bear children and, when the alien's relationship with Ekhlas was discovered, the alien was beaten with the butt of a gun and shot at between the legs. The alien and Ekhlas then obtained a visa to the United States after discovering Ekhlas was pregnant with their child, Ekhlas was able to obtain a divorce, and the couple married. While in the United States, Ekhlas's former husband threatened to kill both of them if they ever returned to Yemen. As proof of his intent, he "orchestrated the detention of Ekhlas's father for two or three days before local government officials insisted upon his release."

Id. at 536. In denying the petition for review, the circuit court concluded that "even though [the alien] asserts that his wife's ex-husband is a powerful man within Yemen, it is also true that when that ex-husband allegedly arranged for the detention of Ekhlas's father, government officials intervened and released [the alien's] father-in-law unharmed after two or three days of incarceration. Any such treatment by a non-governmental entity, rectified by official government actors, does not constitute torture under the [CAT]." *Id.* at 539.

Ali v. Reno, 237 F.3d 591, 598 (6th Cir. 2001).

The alien challenged the Board's decision to affirm the Immigration Judge's denial of asylum, grant of withholding of removal to Iraq, and order of removal to either Denmark or Syria and denial of her CAT claim to Denmark. The alien, an Iraqi citizen and former refugee of Denmark used her Denmark passport to obtain a visa to the United States during which time she lived with her husband for 6 years and had two United States citizen children. Upon learning that her father, a sought-after Iraqi government critic, had fallen ill, she returned to Denmark and was stripped of her refugee status and denied asylum in Denmark. Her father's illness had been a ruse to bring her back to Denmark to convince her to leave her husband. The alien's brothers and father beat her. Danish authorities arrested her father and brother, interrogated them, and offered to warn these family members not to approach her in the future. However, the police report indicated that the police had been instructed to dismiss the case. After moving to her sister's home, a 5-hour drive from her father's, and being threatened at gunpoint by her brothers, the alien fled to the United States. In concluding that the Board's decision to affirm the Immigration Judge's denial of CAT protection was not manifestly contrary to the law, the Sixth Circuit found that Danish police did not acquiesce to torture against the alien. Specifically, the circuit court concluded that the Danish government did not "breach its 'legal responsibility to prevent torture'" because it apprehended the alien's brothers, interrogated them and were prepared to file charges and that any "inability to control the activities" of the alien's family members "stem[med] simply from [her] refusal to allow punishment of her brothers." *Id.*

Seventh Circuit

Bitsin v. Holder, 719 F.3d 619, 631 (7th Cir. 2013) ("Given that the Bulgarian authorities both have attempted to bring [an organized crime syndicate] to justice and also have provided protection for [the alien's father] during the course of criminal proceedings, we cannot conclude that [the alien] has met his burden of showing that he will more likely than not be tortured 'at the instigation of or with the consent or acquiescence of' the Bulgarian government should he return to that country.").

Eighth Circuit

Saldana v. Lynch, 820 F.3d 970, 976-78 (8th Cir. 2016).

The aliens claimed that they would be harmed by members of a criminal gang in Veracruz, Mexico, called the Matazetas who believed that they had information about a rival cartel.

Despite testimony from a country conditions expert that the government is unable to control the Matazetas, the court concluded that "[e]vidence concerning the Mexican government's efforts to combat criminal organizations in Veracruz and elsewhere was sufficient to support the Board's finding that the government was not likely to acquiesce in any torture by the Matazetas." *Id.* at 978. The court noted that there is "evidence that the Mexican government has dedicated substantial resources to controlling criminal organizations. More than 3,000 federal police officers were fired in August 2010 in an effort to purge official corruption. In reaction to the Matazetas, after [the aliens] left the country, the Mexican government deployed federal police and military troops to Veracruz, and reported a significant drop in violence in that area." *Id.* at 976. When discussing the alien's asylum claim, the court stated that such evidence does not mean "that the Mexican government has eliminated criminal gangs or that there is no difficulty in controlling these organizations. But a government that is 'unable' to control criminal activity cannot mean anything and everything short of a crime-free society; the standard is more akin to a government that has demonstrated 'complete helplessness' to protect victims of private violence . . . . Given the documented efforts of the Mexican government to combat the private violence at issue here, we are not prepared to say that no reasonable adjudicator could reach the Board's conclusion." *Id.* at 976-77.

Marroquin-Ochoma v. Holder, 574 F.3d 574, 576 (8th Cir. 2009).

The alien worked for a large export company and frequently handled cash in her position. *Id.* at 576. She started receiving death threats and threats against her family from gang members at home. *Id.* She was never contacted in person. *Id.* The alien informed her employer of the threats, but she did not ask for any assistance from company security, even though security officers would sometimes escort employees home. *Id.* And she reported the threats to the police, who sent extra patrols to her neighborhood but took no other action. *Id.* The police instructed the alien to report her claims to the prosecutor's office, but she declined to do so since she believed it would be futile. *Id.* Approximately 1 year after started with her company, she fled from Guatemala. *Id.*

The alien submitted numerous articles and reports showing that the Guatemalan government has difficulty in controlling the extensive gang violence in Guatemala, as well as some evidence of general police reluctance to pursue gang members. *Id.* at 579. Based on this evidence, she argued that the Guatemalan government "condones" gang activity. *Id.* at 579-80. The court disagreed, noting that the record also includes evidence that the government aggressively prosecutes gang members. *Id.* at 580. The court therefore concluded that, "[o]n the whole, the record before us indicates that law enforcement is weak and inexperienced, not that it acquiesces in gang activity." *Id.* The court found it significant that "the police did respond to her report by increasing patrols in her neighborhood and that it was [the alien] herself who declined to formalize her complaint to the public prosecutor." *Id.* "If anything, the record shows that the government attempted to protect [the alien] and that [the alien], without adequate justification, declined to pursue the avenues of law enforcement available to her." *Id.* Thus, the court found that "uncontrolled gang activity does not dictate a conclusion that the government acquiesced in

the specific acts directed toward the [alien]." *Id.* (citing *Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir. 2005)).

Solis v. Mukasey, 515 F.3d 832, 836 (8th Cir. 2008) ("Although the government of El Salvador may struggle to control violence, there is no evidence in the record that government agents participate or acquiesce in possible torture perpetrated by others." (citing *Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir.2005) (holding that, while the government of El Salvador may have a problem controlling gang activity of which it is aware, this is not sufficient to find torture by third parties)).

Surya v. Gonzales, 454 F.3d 874, 878 (8th Cir. 2006) (holding that the alien, an ethnic Madurese, had "not shown that any of the acts he complains of were committed by, at the direction of, or with the acquiescence of public officials. He has not shown that the Indonesian government was unwilling to address problems of ethnic violence between Dayaks [a rival ethnic group] and the Madurese").

Tolego v. Gonzales, 452 F.3d 763, 766-67 (8th Cir. 2006) (denying CAT protection because nothing in the record demonstrates that government officials engaged or acquiesced in a pattern or practice of persecuting Chinese Christians as a group and noting that "the record shows that the government helped rebuild his church after the 1997 attack and increased security in the area to prevent future violence.").

Menjivar v. Gonzales, 416 F.3d 918, 922 (8th Cir. 2005).

The alien petitioned for review of the Board's denial of CAT. A gang member named Moncho asked the alien, who was then 15 year old, to be his girlfriend. The alien declined and the gang member became furious. He shot at the alien, killed her mother, and paralyzed her cousin. The alien reported the shooting to the Salvadoran police, who responded about two hours later and investigated the crime. The closest police station was two hours away. Moncho went into hiding. The alien heard rumors that Moncho left El Salvador and was angry with the alien because the police were looking for him. The alien was told that Moncho was back in El Salvador and looking for her, but she did not report his reappearance to the police. Instead, she fled the country. The Immigration Judge and the Board concluded that the alien had not shown the requisite government nexus and denied her application for relief. The court found that substantial evidence supported the Board's determination that Moncho's actions were not attributable to the Salvadoran government. The court noted that the police responded to the tragic shooting of the alien's relatives as quickly as possible. *Id.* at 922. The court also found that the alien's testimony that Moncho was angry with the alien because the police were looking for him supported an inference that the police were pursuing Moncho and that their pursuit was effective enough that it provoked his anger. *Id.* The court noted, moreover, that the alien did not report Moncho's subsequent reappearance to the police, so the government had no opportunity to respond to this development. *Id.* The court discounted the alien's articles describing gang violence and police ineffectiveness in El Salvador, stating that to "whatever extent these materials show that there is a general problem of gang violence in El Salvador, we do not believe

they can override the evidence in this case that police conducted a thorough investigation of Moncho's criminal acts, and apparently forced him into hiding as a result." *Id.* For these reasons, the court held that "the evidence does not compel a finding that the El Salvadoran police have acquiesced or would acquiesce in Moncho's criminal activities." *Id.* at 923 ("The newspaper articles at most demonstrate that the government has a problem controlling gang activity of which it is aware, but this is insufficient to compel a finding of the torture of citizens by third parties.").

Ninth Circuit

Alphonsus v. Holder, 705 F.3d 1031, 1049 (9th Cir. 2013) (determining that the alien had not shown that a public official or other individual acting in an official capacity would acquiescence in the alien's torture as a Christian where the country conditions reports state "that religious violence has decreased in Bangladesh, that freedom of religion is protected, and that the Bangladeshi government is taking steps 'to promote understanding and peaceful coexistence among different communities'").

Tenth Circuit

Ferry v. Gonzales, 457 F.3d 1117, 1131 (10th Cir. 2006).

The alien petitioned for review with the Tenth Circuit, arguing that the Board erred in concluding that he did not establish that any torture would be instigated by, or with the consent or acquiescence of, the United Kingdom's government. In denying CAT, the Board stated that the conduct of the United Kingdom indicated that the government had attempted to protect individuals included on the death lists of Northern Irish loyalist paramilitary groups. The Board cited the alien's own testimony that he informed the government of his inclusion on a death list, and that the government provided the alien a security grant. The court agreed with the Board's determination that the alien failed to show acquiescence to support a likelihood of torture if he returned to the United Kingdom. The alien's own testimony showed that the government provided him information and financial assistance to prevent torture.

Unpublished

Escamilla v. Holder, 459 F. App'x 776, 790 (10th Cir. 2012).

The court agreed with the Board's conclusion that the government of El Salvador does not acquiesce in gang violence. *Id.* While the court recognized that people wearing police uniforms were sometimes involved with the gangs when they attacked the alien, the alien was not sure that the people wearing the uniforms were actually police officers. The alien was shot once by police officers who were not involved in gang activity, but the officers who shot him mistook him for someone else. "The national government in El Salvador has made reduction of gang activity a primary goal, and it is working to mitigate gang violence. While the [court recognized that] the government's track record in reducing gang violence is weak, we cannot say that the government

has acquiesced in gang activity." *Id.* The court also upheld the Board's conclusion that the alien had not shown that the government will consent or acquiesce to torture on account of his HIV status because "El Salvador has laws against discrimination against HIV-positive individuals, although they are not broadly enforced. HIV carries a heavy social stigma in El Salvador, and the record reflects that this stigma sometimes results in violence against HIV-positive individuals, but the record does not indicate that the government acquiesces in this violence as a general matter." *Id.*

Eleventh Circuit

Rodriguez Morales v. U.S. Att'y Gen., 488 F.3d 884, 891 (11th Cir. 2007) (upholding the Board's finding that the Colombian government did not "acquiesce" to the FARC's activities because the alien testified that the police provided him with protection and assistance in relocating his business and investigated his complaints as they arose).

Unpublished

Gonzales v. U.S. Att'y Gen., 432 F. App'x 927, 928 (11th Cir. 2011) (holding that, although the Mexican government has been "entirely successful" in eradicating drug-trafficking violence, the record showed that the Mexican government had engaged in an extensive effort to combat drug-trafficking organizations through measures such as deploying military troops throughout Mexico and thus that the government is actively working against gang violence, not acquiescing in any acts of torture that may occur).

Torres v. U.S. Att'y Gen., 222 F. App'x 893, 896 (11th Cir. 2007) (holding that the alien had not shown that the Columbian government acquiesced in the actions of the FARC because the alien never told the Colombian authorities about the kidnapping, the Colombian government is attempting to combat the FARC's illegal activities, and nothing in the record indicated that public officials were otherwise aware of the FARC's actions with regard to the alien).

VII. Gov't Inaction Not Necessarily Sufficient to Establish Acquiescence

A. Insufficient Information to Trigger Gov't Action

First Circuit

Alvizures-Gomes v. Lynch, 830 F.3d 49, 51-52, 54 (1st Cir. 2016).

The alien, a native and citizen of Guatemala, fled to the United States because he was threatened by gang members in-person several times and received three threatening letters after he rejected the gang members' recruitment efforts. *Id.* at 51-52. The alien claimed that the Guatemalan government is unwilling to meaningfully protect him from the gangs. *Id.* at 54. He testified that he sought out the police after he received a threatening letter from a gang. The letter was unsigned and composed of characters cut out from magazine pages, and the police advised him

that "they couldn't do much" with such limited information. The Board concluded that the mere fact that the police, with nothing to go on, were unable to solve a particular case did not demonstrate their likely consent or acquiescence to torture.

The First Circuit agreed, noting that the alien cannot establish that the police were unwilling to pursue the gang members where he provided law enforcement with incomplete information. The court also found that the alien could not rely on country conditions reports, which he says demonstrate the overall corruption and ineffectiveness of the Guatemalan authorities. According to the court, these reports do not relieve him of the obligation to point to specific evidence indicating that he, personally, faces a risk of torture because of these alleged shortcomings because such specificity is a necessary element of a CAT claim.

Second Circuit

None

Third Circuit

Sevoian v. Ashcroft, 290 F.3d 166, 176 (3d Cir. 2002) (holding that an alien who had been attacked by a group of unknown individuals had not shown that the government had acquiesced in this attack, even where the police did not question the alien or his mother after they reported the assault).

Fourth and Fifth Circuits

None

Sixth Circuit

Rreshpja v. Gonzales, 420 F.3d 551, 557 (6th Cir. 2005).

The court concluded that the Immigration Judge and the Board did not err in denying CAT. The Board and the Immigration Judge also found that the Albanian government's inability to discover the alien's kidnappers, who were members of a human trafficking ring, was a result of her failure to provide more information to the police. The court held that an inability to solve a crime because of adequate information coupled with a record that indicated that "the Albanian government is currently taking steps to suppress human trafficking in Albania and to penalize local police officers who are directly or indirectly involved in these activities," did not compel the conclusion that Albanian officials would acquiesce in her torture. *Id.* at 557.

Seventh Circuit

None

Eighth Circuit

Juarez Chilel v. Holder, 779 F.3d 850, 852, 856 (8th Cir. 2015).

The alien claimed that gang members threatened and stabbed him in the arm when he refused to join their gang. *Id.* at 852. He reported the incident to the police, but did not follow-up with the police's investigation prior to fleeing to the United States. The alien asserted that he feared future torture from gang violence, and he argued that the Guatemalan government acquiesces in the torture of people like him who resist gang violence. The court rejected the alien's argument because the alien had "told law enforcement about his injury at the hands of gang members, but he admits he never followed up to determine whether they had taken any action in response." *Id.* at 852. Without more, the court held that the alien had not presented "a case of willful non-intervention by law enforcement sufficient to meet the requirements under the CAT." *Id.*

Ninth Circuit

Garcia-Milian v. Holder, 755 F.3d 1026 (9th Cir. 2014) (affirming the denial of CAT because the alien had not shown sufficient evidence of acquiescence where the police declined to investigate the masked men's attack because they lacked sufficient information since the alien could not identify her attackers).

Tenth and Eleventh Circuits

None

B. Inaction due to Ineffectiveness/Lack of Resources

First Circuit

Amilcar-Orellana v. Mukasey, 551 F.3d 86, 92 (1st Cir. 2008).

The alien argued that police in El Salvador are "wholly incapable of protecting" people like him "from retribution by gang members" and also "willfully turn a blind eye to, and at times participate in," gang-related criminal acts. *Id.* However, both the Immigration Judge and the Board concluded that the record shows "the government in El Salvador is trying as best it can[] to control the gangs." *Id.* The court agreed, stating that the country conditions reports indicate that El Salvador has established an anti-gang task force with military personnel stationed in "high crime areas," and made other efforts "to combat gang activity, prosecute offenders, and punish corruption within its own police force." *Id.* (citing *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 43 (1st Cir. 2007) (recognizing that the Salvadoran "government's willingness and ability to prosecute and incarcerate particular gang members" supported an inference of "its ability and willingness to control the gang")). Based on these reports, the court affirmed the Board's decision to deny the alien's application for protection under the CAT.

Second Circuit

Unpublished

Gonzalez-Benitez v. Lynch, No. 15-1054, 2016 WL 3569871, at *1 (2d Cir. June 29, 2016).

The court concluded that the alien had not shown that it was more likely than not that he would be tortured with the acquiescence of the Salvadoran government because the record contained conflicting evidence of the Salvadoran government's efforts to combat gang violence. Although there is evidence that the MS-13 has infiltrated the police force and that gang members can intimidate witnesses with impunity, there is also evidence that police and army officers with gang ties have been identified and suspended, that the Salvadoran government is attempting to fight gang violence through legislation and law enforcement initiatives, and that these initiatives have had some success.

Third Circuit

Amanfi v. Ashcroft, 328 F.3d 719, 726 (3d Cir. 2003) (holding that an alien had not shown that government officials have awareness of the torture he may face at the hands of private actors, known as "macho men," in Ghana).

Fourth Circuit

None

Fifth Circuit

Tamara-Gomez v. Gonzales, 447 F.3d 343, 351 (5th Cir. 2006).

The alien challenged the Immigration Judge and the Board's decisions to deny, inter alia, his CAT application. The alien was a member of the Colombian National Police ("CNP") who conducted a body-retrieval mission in June 2001 from the territory of the Revolutionary Armed Forces of Colombia ("FARC"). He and his family were then threatened by telephone, but were granted permission to live on a CNP military base. In the summer of 2002, one of the other CNP participants in the mission was killed by the FARC and vandals wrote the words snitch on the alien's home. In denying the alien's petition for review, the court pointed to the efforts of the Colombian government at fighting the FARC, including their willingness to protect the alien by moving him to the military base, and ultimately agreed with the Eleventh and Third Circuits that "neither the failure to apprehend the persons threatening the alien, nor the lack of financial resources to eradicate the threat or risk of torture constitute sufficient state action for purposes of the Convention Against Torture." *Id.* at 351.

Sixth Circuit

Zaldana Menijar v. Lynch, 812 F.3d 491, 501-02 (6th Cir. 2015).

The court found that the alien had not shown a clear probability that he would be tortured with the Salvadoran government's acquiescence. "Though [the alien] testified that he believed the police could not protect him from gang violence . . . neither his, nor the other witnesses' testimony indicated that the police participated in, consented to, or willfully ignored the gang's brutality." *Id.* The court concluded that the Board and the Immigration Judge were reasonable in their conclusion that, although El Salvador struggles with police corruption, "the government of El Salvador is attempting to take steps and actions to deal with police corruption" and these deliberate attempts to reduce corruption 'undercut[] any argument that the government of El Salvador would acquiesce or consent in any torture[.]'" *Id.* at 502. "Further, the record includes at least some evidence that the Salvadoran government is accepting the United States' assistance in combating the country's gang enterprises. That the Salvadoran government is unable to control the gangs does not constitute acquiescence." *Id.*

Ventura-Reyes v. Lynch, 797 F.3d 348, 363-64 (6th Cir. 2015).

The alien challenged the Immigration Judge's "interpretation of the statute, which [the alien alleged] excuses abuses by low-level government officials because officials in leadership positions do not condone such behavior [because] the actions of low-level police, irrespective of their leadership, can satisfy the requirements of 8 C.F.R. § 1208.18(a)(1)." *Id.* at 363. The Immigration Judge denied CAT protection, finding that the alien could not show that members of the Peguero and Gonzalez-Molina families, who the alien had alleged wanted to kill him to avenge his involvement with the deaths and imprisonment of members of their family, were connected to the Dominican police or the Dominican military. Specifically, the Immigration Judge considered the alien's testimony of low-level official action members of these family's alleged took, the alien's testimony that the Dominican police protected his aunt's house in 1989 when threatened by the Peguero family, he also considered the country conditions. Unlike other cases in the circuit, where the country conditions evidence "indicated that the . . . police w[ere] plagued by rampant corruption and failed to protect people from violent crime," both the alien's own testimony and the country conditions evidence presented here, supported the conclusion that the leadership of the state law enforcement agencies deal with such actions once they become aware of them. *Id.* at 363-64. Accordingly, the court denied the petition for review.

Kouljinski v. Keisler, 505 F.3d 534, 545 (6th Cir. 2007) (affirming the denial of the alien's application for CAT, which was premised on fear of anti-Semitic violence, because the State Department reports showed the Russian authorities condemn and stop anti-Semitic activities).

Seventh Circuit

Lopez v. Lynch, 810 F.3d 484, 492-93 (7th Cir. 2016).

The court agreed with the Board and the Immigration Judge that the alien did not show that it is more likely than not that he would be tortured if he was removed to Mexico. *Id.* at 492-93. The record indicated that "lesbian, gay, bisexual, and transgender (LGBT) community in Mexico and many openly gay people have not been harmed," Mexican law prohibits such harm, and while there have been incidents of violence towards LGBT individuals in "some parts of Mexico," there are other parts of the country "more accepting of the LGBT community." *Id.* at 493. The court concluded that, "while the numerous articles and studies cited by the [alien] indicate that gay men have been victims of violence in Mexico, these do not suggest that the [alien] is more likely than not to face such violence." *Id.*

Eighth Circuit

Cambara-Cambara v. Lynch, No. 15-1916, 2016 WL 4758488, at *4 (8th Cir. Sept. 13, 2016).

The aliens presented evidence, including a statement by their brother in the Guatemalan National Civil Police Force, that the police investigated reports of violence against the aliens' family but did not capture any perpetrators, at least in part because the gangs "have better weapons than the National Civil Police and the topographic area they hide in favors them." *Id.* However, that a police force struggles to control gang activity "is insufficient to compel a finding of willful blindness toward the torture of citizens by third parties," or a finding of government acquiescence in their criminal activities. *Id.* (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir. 2005)).

Aguinada-Lopez v. Lynch, 825 F.3d 407, 410 (8th Cir. 2016).

The alien relied on country conditions reports identifying instances of police-corruption to show that the government would acquiesce to gang members torturing her. The court noted, however, that the alien's evidence also identifies "government efforts to end gang violence, including a stimulus program to rehabilitate gang members, a U.S.-funded wiretap center, and an elite anti-gang police unit." *Id.* Based on this record, the court concluded that "El Salvador has struggled to protect against gang violence, but it has not acquiesced to gang violence." *Id.*

Garcia v. Holder, 746 F.3d 869, 873-74 (8th Cir. 2014).

The court held that the alien had not shown that he would be tortured at the hands of gang members with the acquiescence of a public official in Guatemala. *Id.* at 873. The acquiescence "inquiry centers upon the willfulness of a government's non-intervention. A government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it, but it does cross the line into acquiescence when it shows willful blindness toward the torture of citizens by third parties." *Id.* (quoting *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007)). The country conditions report observed that 2/3 of Guatemalan police districts remained understaffed, but Guatemala has partnered with international organizations to enact anti-gang reforms and to improve law enforcement practices, and Guatemalan authorities

investigated and even arrested the alien's abuser after the alien reported the gang violence, which demonstrates that local authorities are not unwilling to control MS-13. *Id.*

It was additionally unclear why the Guatemalan authorities released the alien's abuser from prison. *Id.* at 874. Absent additional evidence, the inability of Guatemalan police to curtail gang violence does not entitle the alien to CAT relief. "While the evidence may support the conclusion that the Guatemalan government is less than successful at preventing the torture of its citizens by gang members," such evidence is insufficient to show that the government is willfully blind to it. *Id.* Thus, the court agreed with the Board's decision to deny CAT relief.

De Castro-Gutierrez v. Holder, 713 F.3d 375, 376, 381-82 (8th Cir. 2013).

The alien claimed that the FARC was targeting members of his family because of their property holdings and wealth. *Id.* at 376. Although the alien cited State Department reports cataloging the continued FARC violence in Colombia, the court held that, for purposes of withholding of removal under the Act, the alien was required to show the Colombian government "more than 'difficulty controlling'" private behavior. *Id.* at 382 (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir.2005)). Instead, she must show that the government "condoned it or at least demonstrated a complete helplessness to protect the victims." *Id.* (quoting same). The court found that, country conditions reports demonstrate the contrary to be the case since "the government has taken steps to control the FARC and similar groups." *Id.* Because the alien had not met his burden regarding withholding of removal and his claim for CAT relief was based on the same evidence, the court additionally affirmed the denial of CAT. *Id.* at 381-82.

See Gutierrez-Vidal v. Holder, 709 F.3d 728, 733 (8th Cir. 2013) (holding that, under substantial evidence review, local authorities are not unwilling to control gang violence where evidence indicates that they investigated the gang and made arrests).

Purwantono v. Gonzales, 498 F.3d 822, 826 (8th Cir. 2007).

The alien affirmed the denial of CAT relief because, while the alien suffered one beating and other harassment at the hands of an Islamist group, Laskar Jihad, while in Indonesia, the record showed that the Indonesian government has taken action against militant Muslim organizations, and that the activities of Laskar Jihad have declined in recent years. *Id.* The country conditions report additionally indicates that Laskar Jihad officially disbanded in October 2002. *Id.*

Bartolo-Diego v. Gonzales, 490 F.3d 1024, 1029 (8th Cir. 2007) ("Even though the government's failure to investigate and punish other individuals and clandestine criminal groups who break the law has resulted in human rights abuses, the failure is due more to a weak and inefficient judicial system than to government acquiescence or approval.").

Menjivar v. Gonzales, 416 F.3d 918, 923 (8th Cir. 2005) (holding that, to obtain CAT relief, it is insufficient merely to show that "the government has a problem controlling gang activity of which it is aware").

Ninth Circuit

Andrade-Garcia v. Lynch, 828 F.3d 829, 832-33, 836 (9th Cir. 2016).

The alien had returned to the United States to avoid paying Guatemalan gang members money that they demanded during threatening phone calls. *Id.* The alien was afraid to return because the gang members had threatened to shoot him and cut off his arm. He believed this threat because they had killed his aunt 3 years before for not paying the money they demanded. The alien conceded that the police had investigated his aunt's murder, but his cousin decided "not to do anything because she was already dead and they thought that they would not find anything out." *Id.* at 823-33. Although the alien stated that he did not know of any connection between the gang members and the Guatemalan government, he speculated that the gang members are able to influence the police because the Guatemalan government is corrupt and he had seen cases where a robber is caught and then released the same day after bribing the police. *Id.* at 833.

The court concluded that the Immigration Judge properly determined that the alien had not shown that the police were aware of the gang's extortion activities and breached their legal responsibility to stop it was supported because "a general ineffectiveness on the government's part to investigate and prevent crime will not suffice to show acquiescence." *Id.* at 836 (citing *Garcia-Milian v. Holder*, 755 F.3d 1026, 1034 (9th Cir. 2013)). The alien had conceded that "the police actively investigated his aunt's death, but stopped that investigation in accordance with his cousin's decision because 'they thought that they would not find anything out.'" *Id.* "The inability to bring the criminals to justice is not evidence of acquiescence, as defined by the applicable regulations." *Id.* (citing same). The court was also not persuaded by the alien's testimony that "a Guatemalan police officer took a bribe from a robber and released him demonstrate that the government was aware of and acquiesced in the torturous activity that constitutes the basis for" the alien's claim. *Id.* (citing *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013); *Afriyie v. Holder*, 613 F.3d 924, 937 (9th Cir. 2010)).

Garcia-Milian v. Holder, 755 F.3d 1026 (9th Cir. 2014).

The alien was beaten and sexually assaulted by masked men who threatened to kill her if she did not divulge the whereabouts of her former husband. Two days later, the alien reported the assault to the police who said that they were unable to help her because she could not identify her attackers. Fearing for her life, the alien fled Guatemala. The Immigration Judge and the Board denied the alien's CAT claim, finding that she had not established that the beating and rape were inflicted by or at the instigation of or with the acquiescence of any government official.

The court agreed, concluding that although the alien testified that the police were unwilling to investigate the attack because her attackers were masked and she could not identify them, and country reports indicated that the Guatemalan government had been generally ineffective in preventing or investigating sexual assaults against women, there was no showing of police corruption or that police acquiesced to such crimes. *Id.* at 1034–35. In addition, the Guatemalan

government and police had taken steps to combat violence against women, including imposing hefty penalties for rape, and establishing a special prosecutor for crimes against women and a special police unit to investigate sex crimes. *Id.* The court noted that a government "does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it." Id. at 1034. "Evidence that the police were aware of a particular crime, but failed to bring the perpetrators to justice, is not in itself sufficient to establish acquiescence in the crime." Id.

Tenth Circuit

None

Eleventh Circuit

Reyes-Sanchez v. U.S. Att'y Gen., 369 F.3d 1239, 1243 (11th Cir. 2004).

The alien petitioned for review of the Board's denial of CAT protection. The court dismissed the petition, finding that the Peruvian government did not acquiesce in the harm the Movimiento Revolucionario Tupac Amaru ("MRTA") inflicted on the alien. When MRTA members raided the alien's store and assaulted him and his wife, the police came to the scene, verified the facts, took fingerprints, and collected the MRTA leaflets. Thus, alien incorrectly claimed that the police "did nothing" to respond to the robbery and assault. *Id.* "That the police did not catch the culprits does not mean that they acquiesced in the harm." *Id.* The court found that the CAT does not extend so far because, if that were the case, a person could obtain CAT relief merely because he was attacked by a gang of neighborhood thugs whom the police were unable to apprehend. The court also concluded that the Board properly relied on country reports providing that the Peruvian "[g]overnment actively, albeit not entirely successfully, combats the MRTA." *Id.*

C. Inaction in the Face of Civil Strife/Lawlessness

Seventh Circuit

Lozano-Zuniga v. Lynch, 832 F.3d 822, 830-31 (7th Cir. 2016).

The Immigration Judge concluded that the alien had not established that it was more likely than not that he would be tortured in Mexico. The alien's evidence, all of which the Immigration Judge considered, was paltry at best: (1) the alien's mother received a telephone call asking for information about family members in the United States, in which the caller implied that he wanted money and would kidnap the alien or his sister in order to get ransom money from relatives living in the United States; (2) the murder of two Seventh Day Adventists by an unknown assailant; and (3) the general danger caused by the Zetas in Mexico, along with the fact that some law enforcement officers were corrupt and helping the Zetas. The alien, however, had never been personally threatened or harmed in Mexico. Based on this record, the court agreed with the Immigration Judge that the alien had not sufficiently shown that any Mexican public official currently would seek to torture the respondent or would acquiesce in or exhibit willful

blindness toward any torture inflicted on him by any gang member, any criminal, or anyone else. *Id.* at 830-31 (holding that "evidence about generalized violence or danger within a country is not sufficient to make a claim that it is more likely than not that [an alien] would be tortured upon return to his home country").

Khan v. Holder, 766 F.3d 689, 698 (7th Cir. 2014).

The court affirmed the Board's decision to deny the alien's application for CAT relief because the alien's counsel essentially conceded that the alien was not in danger of torture by the Pakistani government. Counsel stated, when reminded that he needed to present a case for deferral, he responded: "We've never alleged that the government of Pakistan has tortured the respondent, kidnapped him, or done any harm to him whatsoever. It's a group that the government would be unable to control." *Id.* Furthermore, the county conditions reports "contain only a few oblique and summary references to the government's ability to control violent clashes between [Islamist militants]—saying, for example, that '[t]he Pakistani state is often either unable or unwilling to protect its citizens from the violent [militant] factions." *Id.*

Jan v. Holder, 576 F.3d 455, 458 (7th Cir. 2009).

The court held that the alien did not prove a likelihood that he would be tortured upon return by Pakistani government officials. *Id.* "There is no evidence that the government was behind either the 1998 ambush of [the alien's] family or the other threats made against [the alien] at his home and office. Further, the country reports and news articles on police corruption in Pakistan are too general and vague to suggest that Jan in particular would face torture." *Id.* (citing *Ayele v. Holder*, 564 F.3d 862, 871 (7th Cir. 2009)). "The only concrete example of government intimidation was [the investigative officer's] brandishing the gun in his meeting with [the alien], but even in that case [the officer] had no further contact with [the alien]." Finally, the court observed that there was not "any evidence that Pakistani government officials contacted [the alien] or his family during the past ten years." *Id.*

VIII. Failure to Report

First Circuit

Mayorga-Vidal v. Holder, 675 F.3d 9, 20 (1st Cir. 2012).

Gang members threatened the alien after he refused to join their gang. *Id.* at 11-12. The Immigration Judge determined that the alien had not established that the government acquiesced to the gang's past threats, nor would it do so in the future. With regard to the past threats, the Immigration Judge observed that the alien "did not report the threats to the police or any other governmental agency." *Id.* at 20. The Board affirmed this determination, and the court agreed, finding that the Immigration Judge's observation, when coupled with evidence that the Salvadoran government has been taking concrete measures to combat gang violence—such as establishing an anti-gang task force, deploying military personnel to high crime areas, and

arresting individuals pursuant to anti-gang legislation—undermined the alien's ability to show that the Salvadoran government would acquiesce to torture by gangs. While the court acknowledged evidence that some police officers have engaged in gang-related activity, it determined the record also supports the conclusion that such individuals were arrested for their actions, expelled from the police, or otherwise held responsible for misconduct. Furthermore, evidence that the Salvadoran government has not been completely effectual in its anti-gang efforts was insufficient to establish it would acquiesce in the alien's torture by gang members.

Faye v. Holder, 580 F.3d 37, 39, 42 (1st Cir. 2009).

The alien who is a native and citizen of Senegal testified that her family, who are devout Muslims, beat her after she became pregnant out of wedlock. The alien did not report this abuse to any government authorities because the abusers were her family members. *Id.* at 39. Her family allowed the alien and her child to live in their house for 10 years and the beatings did not continue. The alien's father forced her to marry her first cousin, who beat and raped her on multiple occasions. The alien did not report her husband's abuse to the authorities because he was "of my family." *Id.* The alien wanted a divorce, but her husband would not agree. The alien fled to the United States. The alien's husband raped and impregnated the alien while visiting the alien in this country. The alien also did not report this rape to United States authorities because she was fearful that reporting the abuse would put her immigration status in jeopardy. The alien and her husband divorced in 2003.

The Immigration Judge and Board concluded that the alien had not proven that the Senegalese government would torture her or permit her to be tortured if she returned to Senegal. *Id.* at 42. The court agreed, finding significant the fact that the alien had not reported her abuse to authorities. The court also concluded that the country conditions report's cursory observation that the government is reluctant to intervene in domestic disputes is not a sufficient link to the Senegalese government to past or future torture.

Second Circuit

None

Third Circuit

Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 610 (3d Cir. 2011).

The alien testified that he sought police protection on 5 different occasions, but the police were either not able to help, or not willing to help by prosecuting the gang members who were harming him. *Id.* He testified that the police would always tell him that they were investigating but that at no point did he ever "see anything happen." *Id.* The Board found that the fact that the alien was unaware of progress in the investigation does not mean that the police were not taking measures to deal with the problem in ways that were not obvious to the alien. *Id.* at 611. Based upon this ambiguity in the testimony, and applicable country conditions reports showing that the

Honduran police do take steps to curb gang violence, the court affirmed the Board's determination that the government of Honduras was not willfully blind to or did not acquiesce to the gang's activities.

Fourth Circuit

Martinez v. Holder, 740 F.3d 902, 914 (4th Cir. 2014).

In this case, the Immigration Judge concluded that the alien had not made the necessary showing regarding acquiescence because he "never reported the shooting or other threats to his life to the police in El Salvador" and because "country condition information reflects that government officials in El Salvador are taking some steps to address the difficult problem of gang violence there." *Id.* The Board affirmed on similar grounds, holding that "respondent cannot complain that the Government did not prosecute his attackers because he never made a report" and noting that the "Government of El Salvador has made attempts to reduce or control gang activity," citing several reports about country conditions in El Salvador. *Id.* The court concluded that the alien's argument that the Board did not consider relevant evidence was not borne out by the record and affirmed the Board's denial of CAT.

Zelaya v. Holder, 668 F.3d 159, 163-64, 168 (4th Cir. 2012)

Gang members in Honduras beat and threatened to shoot the alien after he refused to join their gang. He went to the police station and he filed a report but "the police told him that they could not help him because the gang members would hurt them as well." *Id.* at 163. The Immigration Judge denied the alien's CAT claim on the basis that he had not demonstrated acquiescence or consent of a public official, and the Board affirmed. *Id.* at 164. The court remanded to allow Board to address why Honduran police officers' ultimate refusal to help the alien in any way when he reported that he had just been threatened with a gunshot by a gang member for resisting gang recruitment did not satisfy the regulatory definition of "acquiescence of a public official"—that is, "with the awareness of the local police that this would take place and the breach of the local police's legal responsibility to intervene" on the alien's behalf—for purposes of analyzing alien's CAT claim. *Id.* at 168.

Lopez-Soto v. Ashcroft, 383 F.3d 228, 241 (4th Cir. 2004), *reh'g en banc granted.*

The alien was harmed by gangs. The court concluded that, while the record may show that, in the abstract, government officials know of the gang's activities, the alien had not demonstrated local government officials are "willfully blind" to the torture of their citizens by third parties. *Id.* The court noted that neither the alien nor his family went "to the police . . . because he believed that it would do no good to go to the police and feared that there might be retaliation on his family if he went to the police." *Id.*

Fifth and Sixth Circuits

None

Seventh Circuit

Musa v. Lynch, 813 F.3d 1019, 1024-25 (7th Cir. 2016).

The court agreed with the Immigration Judge that the alien had not shown that FGM is likely to be carried out by or with the acquiescence of the government in Botswana. *Id.* at 1024. The Immigration Judge correctly found that the alien had not pointed to evidence in the record to substantiate her testimony that the government would have permitted her family to subject her to FGM even if she had reported their attempts in 2002 and 2003. *Id.* at 1024-25.

Eighth Circuit

Garcia-Milian v. Lynch, 825 F.3d 943, 945-46 (8th Cir. 2016).

The aliens argued that the Board erroneously denied their CAT application because the Immigration Judge and Board ignored substantial evidence in the record showing the inability of the Guatemalan government to control gang violence and "police complicity in gang activity." *Id.* However, the court noted that, "[w]hile it may be that the Guatemalan government is less than successful at preventing the torture of its citizens by gang members, this conclusion alone does not mean that the government is willfully blind toward it." *Id.* at 946 (quoting *Juarez Chilel v. Holder*, 779 F.3d 850, 856 (8th Cir. 2015)). Moreover, the court found it significant that the aliens never informed Guatemalan law enforcement of any fears of gang violence after her uncle was murdered. *Id.* According to the court, the aliens thus "failed to present a case of willful non-intervention by law enforcement sufficient to meet the requirements under the CAT." *Id.* (quoting same).

Ninth Circuit

Afriyie v. Holder, 613 F.3d 924, 927-28, 932 (9th Cir. 2010).

The alien petitioned for review of the Board's denial of CAT. The alien, a Baptist preacher (and convert from Islam) in a predominantly Muslim part of Ghana, was harassed, threatened, and beaten in retaliation for preaching in two villages. In addition, several members of his church were murdered. The alien reported the threats and beating to the police in the first village, and in the second (where the murders took place), he asked for police protection, which was not available due to a lack of resources. *Id.* at 927-28. The Board affirmed the denial of CAT, noting that most of the incidents of harm had not been reported to the police. Those that had been reported were written up by the police; and those that had not were committed by unknown assailants, thus calling into question what the police could have done even if they had been reported. The court rejected this analysis, finding that while the evidence showed that the police

were willing to follow up on a report of harm, but the other evidence, including the police's failure to provide protection when asked, tended to show that the police were not able to prevent or prosecute acts such as the murders of the respondent's followers. The court also found that the failure to report all of the incidents of harm was not dispositive because the alien had testified "to specific incidents in which individuals closely connected to the . . . alien unsuccessfully sought police protection or investigation for crimes related to the ones against him, such testimony is certainly pertinent and must be considered." *Id.* at 932. The court noted that the alien's proselytizing caused the murders of his sister, nephew, and group members, and that this activity was also the basis for the assault against the alien and his fear of persecution. "That at least two of these murders were reported to the police, with no apparent progress in solving them, is highly relevant evidence to the question whether Ghanaian authorities were unable, even if willing, to protect [the alien] from a similar fate." *Id.* The court remanded for further consideration of acquiescence because there was evidence indicating that the government of Ghana was aware of the danger the alien was facing, yet unwilling to protect him. *Id.*

Santos-Lemus v. Mukasey, 542 F.3d 738, 748 (9th Cir. 2008), *overruled on different ground by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).

The court concluded that the alien had not met his burden of proof with regard to CAT because his argument that "police are unwilling to protect him or are themselves members of the gang is unsupported and speculative, particularly because he failed to report any incidents to the police." *Id.* The court additionally noted that "it is undisputed that any torture [the alien] fears would be committed by private individuals, not the government, and the Salvadoran government was not even aware that [the alien] had been targeted by the gang because the incidents were never reported and there is no evidence in the record suggesting the government may have otherwise been aware of threats made against [the alien]." *Id.* The court therefore denied the alien's petition for review based on the CAT claim.

Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1056-57 (9th Cir. 2006).

The alien, a transgender Mexican national, was beaten by his parents, his cousins and acquaintances raped him, the police brutally murdered two gay people he knew, and the police arrested and detained him for several hours, during which time the police chief threatened to detain him longer in the future if he again heard about him having sex with men. *Id.* at 1052. The Board denied that alien's CAT claim based on the background evidence of country conditions in Mexico and the alien's failure to report the alleged harm to the police. The court rejected this analysis, finding that "[e]vidence of background country conditions alone cannot establish that specific acts of persecution did or did not occur." *Id.* at 1056. The court noted that the Immigration Judge's decision "rests on the unwarranted premise that the only way a public official can have such awareness, and thus that the duty to intervene can arise, is if the applicant reports the alleged torture to him." *Id.* But the CAT does not require an alien to report torture; "[i]t is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it." *Id.* at 1060. The court found that the Immigration Judge's decision is "fatally

flawed" because she did not make findings of fact as to whether "the teacher or the prison supervisor was not a 'public official' to whom this duty to intervene applied." *Id.* Thus, the petition for review was granted and the case was remanded for further proceedings.

Tenth and Eleventh Circuits

None

IX. Relevance of a Government's Ability to Control Torturers

First and Second Circuits

None

Third Circuit

Silva-Rengifo v. Att'y Gen. of U.S., 473 F.3d 58, 65 (3d Cir. 2007) ("[A]lthough a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under the CAT, that inquiry does not turn on a government's 'ability to control' persons or groups engaging in torturous activity.").

Fourth Circuit

None

Fifth Circuit

Tamara-Gomez v. Gonzales, 447 F.3d 343, 351 (5th Cir. 2006) (concluding that Colombian government's inability to provide complete security from guerilla group did not constitute government acquiescence).

Sixth Circuit

None

Seventh Circuit

Sarhan v. Holder, 658 F.3d 649, 657-58 (7th Cir. 2011).

The alien argued that the Jordanian government could not and would not do anything to protect her from an honor killing by a third-party. The court held that the evidence "permits no conclusion other than that the government is *ineffective* when it comes to providing protection to [potential victims of honor killings]." *Id.* at 657 (emphasis added). The court noted that "this

showing satisfies both the standards for finding governmental action for purposes of withholding and also those under the CAT." *Id.* at 657-58.

Tunis v. Gonzales, 447 F.3d 547, 551 (7th Cir. 2006) (finding the fact that a government is not responsible for individuals whom it is unable to control "[t]rue, but irrelevant" in light of evidence that the government condoned the torture).

Eighth Circuit

Cambara-Cambara v. Lynch, No. 15-1916, 2016 WL 4758488, at *4 (8th Cir. Sept. 13, 2016) (observing that a police force's struggles to control gang activity are insufficient to compel a finding of willful blindness toward the torture of citizens by third parties).

Marroquin-Ochoma v. Holder, 574 F.3d 574, 579 n.3 (8th Cir. 2009) (observing that other courts have refuted the Board's characterization of acquiescence as not reaching governments who are unable to control torturers even if they are willing to do so (citing *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007); *Tunis v. Gonzales*, 447 F.3d 547, 551 (7th Cir. 2006)).

Ninth Circuit

Zheng v. Ashcroft, 332 F.3d 1186, 1195 n.8 (9th Cir. 2003) (citing The American Heritage Dictionary of the English Language (4th ed. 2000) ("Synonyms: assent, agree, accede, acquiesce, consent. . . . These verbs denote acceptance of and often belief in another's views, proposals, or actions. Assent implies agreement, especially as a result of deliberation: They readily assented to our suggestion. . . . Acquiesce suggests passive assent because of inability or unwillingness to oppose: I acquiesced in their decision despite my misgivings.")).

Tenth Circuit

Unpublished

Hernandez-Torres v. Lynch, 642 F. App'x 814, 820 (10th Cir. 2016) (recognizing that "[o]ther circuits have concluded that a government's inability to provide complete protection does not demonstrate government acquiescence" (citing *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 351 (5th Cir. 2006); *Reyes-Sanchez v. U.S. Att'y Gen.*, 369 F.3d 1239, 1242-43 (11th Cir. 2004)).

Eleventh Circuit

Reyes-Sanchez v. U.S. Att'y Gen., 369 F.3d 1239, 1242-43 (11th Cir. 2004) (concluding that Peruvian government's inability to apprehend members of terrorist group that robbed and assaulted the alien did not demonstrate government acquiescence).

X. Indicia of Acquiescence

A. Unwillingness to Intervene

Second Circuit

Delgado v. Mukasey, 508 F.3d 702, 705, 709 (2d Cir. 2007).

The alien, a computer technician, had been kidnapped by the FARC, who asked her to set up their computer network. When the FARC's computer equipment did not arrive, they released the alien and told her they would find her again when they needed her and instructed her not to go to the police. Soon after her released, the alien heard that members of the FARC were looking for her in her hometown. These individuals indicated that they were looking for the alien because the computer equipment had arrived. The Board denied the alien's CAT claim because the record was "devoid of any evidence" from which it could infer that she would suffer harm "with the acquiescence of the Colombian government." *Id.* at 705.

Remanding the record to the Board to consider the alien's testimony that several days after her kidnapping by the FARC she filed a complaint with the local authorities, but they did not give her complaint "much importance" because she was "just a civilian person" and a country conditions report that the government, "[w]ith the stated goal of furthering peace talks," had allowed the FARC "to maintain control over a Switzerland-sized area" of the country. *Id.* The court held that the existence of this evidence precluded the Board from concluding that "the record is devoid of any evidence" to support a claim of government acquiescence in the FARC's retaliatory violence. *Id.*

Third Circuit

Pieschacon-Villegas v. Att'y Gen. of U.S., 671 F.3d 303, 309, 311-12 (3d Cir. 2011).

The Board dismissed the alien's appeal of the Immigration Judge's decision to deny his application under the CAT. The Board concluded that the "[CAT] protection does not extend to persons who fear entities that a government is unable to control. To demonstrate acquiescence, the respondent must do more than show that the officials are simply aware of the activity constituting torture yet are powerless to stop it." *Id.* at 311. The Board based its findings regarding the lack of acquiescence on the fact that "the Colombian government actively opposes" the FARC—the organization the alien fears—and it is unable to control the FARC. *Id.*

The court reversed, noting that the Board made two errors. First, the Board's assumption that "[CAT] protection does not extend to persons who fear entities that a government is unable to control" is contrary to circuit precedent. *Id.* For instance, in *Gomez-Zuluaga v. Att'y Gen. of U.S.*, 527 F.3d 330, 350-51 (3d Cir. 2008), the court held that the Colombian government could be willfully blind and thus be found to have acquiesced, even if it was unable to control those engaged in torturous activity where two government representatives told the alien that "there was

nothing they could do to protect her" from the FARC. *Pieschacon-Villegas*, 671 F.3d at 311. Second, the fact that the Colombian government opposes the FARC is not dispositive of whether the government would acquiesce in the alien's torture at the hands of the FARC. The court noted that "[t]he mere fact that the Colombian government is engaged in a protracted civil war with the FARC does not necessarily mean that it cannot remain willfully blind to the torturous acts of the FARC." *Id.* at 312 (quoting *Gomez-Zuluaga v. Att'y Gen. of U.S.*, 527 F.3d at 351). In *Gomez-Zuluaga*, the alien had submitted country reports stating that the Colombian government was aware that the FARC routinely tortured, mutilated, and killed people and that "paramilitaries sympathetic to the government often engage in similar activities with tacit approval from the government." *Id.* (quoting *Gomez-Zuluaga v. Att'y Gen. of U.S.*, 527 F.3d at 351). According to the court, this evidence was sufficient to show tacit governmental approval of, and willful blindness toward, the torturous activities of an entity, even if the Colombian government is engaged in a war with that entity.

Gomez-Zuluaga v. Att'y Gen. of U.S., 527 F.3d 330, 350-51 (3d Cir. 2008).

The court remanded the case for the Board to consider the effect of evidence that both the police officer and the military officer that the alien had been dating were aware of the fact she had been kidnapped and threatened, and even though both were government representatives, told her that there was nothing they could do to protect her. *Id.* at 350. While acknowledging that these statements are different than filing an official police report without response, the court concluded that "these men essentially told her that even if they went to the proper authorities, these authorities would do nothing to stop it." This, the court found, "may be circumstantial evidence that the Colombian government was willfully blind to such treatment and that to pursue official assistance would have been futile." *Id.*

Silva-Rengifo v. Att'y Gen. of U.S., 473 F.3d 58, 69-70 (3d Cir. 2007), *amended*.

The court remanded the case to the Board for further consideration of acquiescence after determining that the record may support a finding that the Colombian government colludes with certain groups that engage in torture. *Id.* at 69. The court also noted that the record may support a finding that the Colombian government participates in the type of torture he fears, in that it fails to prosecute officials and groups charged with human rights offenses. *Id.* at 70. However, the court observed that while "[g]overnment participation in torture certainly suffices to establish acquiescence under the CAT, . . . it is not necessary. Evidence that officials turn a blind eye to certain groups' torturous conduct is no less probative of government acquiescence." *Id.*

Eighth Circuit

Mouawad v. Gonzales, 485 F.3d 405, 414 (8th Cir. 2007).

The court remanded for further consideration of acquiescence. At the time of the alien's hearing, the Lebanese government had made no attempt to disarm Hezbollah, a number of Hezbollah members had been elected to the Lebanese parliament, and the Lebanese government's control

over the group was limited. *Id.* In addition, the alien testified that the police in Lebanon "can't do anything for you" there. *Id.* As a result, Hezbollah could "kill and run and nobody will find out how." *Id.* The alien claimed that he brought complaints about the threats and harassment by Hezbollah to his superior military officer as early as 1995, but the military took no action to protect him. *Id.* Instead, these officers questioned him as to whether he was collaborating with Hezbollah and threatened to detain him beyond his mandatory term of service as a form of punishment. *Id.*

B. Condonation

Third Circuit

Roye v. Att'y Gen. of U.S., 693 F.3d 333, 344 (3d Cir. 2012) (remanding for further consideration of the acquiescence issue where the alien adduced evidence tending to prove that, if removed, he will be physically and sexually assaulted in prison and that Jamaican prison officials will turn a blind eye to that severe mistreatment).

Sixth Circuit

Mandebvu v. Holder, 755 F.3d 417, 433 (6th Cir. 2014).

The Immigration Judge and the Board summarily concluding that "the evidence does not show that it is more likely than not that either respondent . . . will be tortured for any reason if they are returned to Zimbabwe." *Id.* However, the court pointed to country conditions evidence that reflected that the alien may be subject to torture at the acquiescence of the Zimbabwean government, noting that "[d]uring the 2008 elections, [Robert Mugabe's ruling African National Union-Patriotic Front ("ZANU-PF")] increased their use of torture against political opponents . . . [ZANU-PF] set up numerous torture camps throughout the country . . . . One NGO report stated that at least 6,300 victims of torture and assault received medical treatment during the year, nearly double the 3,463 victims recorded in 2007. Torture and other assault methods commonly reported included beating victims with sticks, whips and cables; suspension; burning; electric shock; and falanga (beating the soles of the feet)." *Id.*

Seventh Circuit

Tunis v. Gonzales, 447 F.3d 547, 551 (7th Cir. 2006).

The Immigration Judge ruled that the government of Sierra Leone does not direct or acquiesce in female circumcision, and without such acquiescence the alien cannot seek CAT protection. Because the procedure is performed by the secret societies, which are private groups, the Immigration Judge said that "the government is not responsible for individuals whom it is unable to control." *Id.* The court found that this determination, while true, was irrelevant since "[f]emale circumcision is legal in Sierra Leone, obviously well known to the government, and,

considering the strong international condemnation of the practice, condoned and thus acquiesced in by the government." *Id.*

C. Local Corruption versus National Action

First Circuit

None

Second Circuit

De La Rosa v. Holder, 598 F.3d 103, 106, 109 (2d Cir. 2010).

The alien assisted law enforcement in the United States and facilitated the conviction of other individuals, including a Dominican national who expressed a desire to kill the alien, and who has a brother and other contacts in the Dominican government. Based on these facts and evidence that Dominican authorities are corrupt and ineffective, including infiltration by criminals and involvement in drug trafficking, and there is a pattern of Dominican government involvement in unlawful killings, the alien claimed that he would be tortured in the Dominican Republic. *Id.* The Board found that the evidence failed to show that the Dominican government would acquiesce in acts of torture, explaining that the evidence provided "includes several police investigations and arrests related to his complaints." *Id.* at 109.

The court questioned this reasoning, noting that the Board's logic "implies that the existence of some government actors attempting to prevent torture is sufficient to negate the fact that other government actors would be complicit in that torture, even when evidence strongly indicates that the government as a whole would be unable to prevent the torture from occurring." *Id.* According to the court, the Board seemingly relied on evidence showing that some persons within the Dominican government had taken steps to prevent his torture and assumed that this activity "overrides both the complicity of other government actors and the general corruption and ineffectiveness of the Dominican government in preventing unlawful killings." *Id.* at 110. The court stated that it had "significant doubts about this view of what may constitute government acquiescence." *Id.* The court stated "it is not clear . . . why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence . . . ." *Id.* The court therefore remanded the case and asked that the Board to issue a precedential opinion "on whether, as a matter of law, a government may acquiesce to a person's torture where (1) some officials attempt to prevent that torture (2) while other officials are complicit, and (3) the government is admittedly unable to actually prevent the torture from taking place." *Id.* at 110-11.

Third Circuit

Unpublished

Guerrero v. Att'y Gen. of U.S., No. 16-1217, 2016 WL 6091561, at *3 (3d Cir. Oct. 19, 2016).

The court found that the Immigration Judge and the Board had construed the "acquiescence" standard too narrowly because, in emphasizing the Mexican government's efforts to combat the drug cartels and root out corruption, they had "assumed that as long as the government is attempting to help its citizens, [the alien] cannot establish that a public official or other person acting in an official capacity would acquiesce in his torture at the hands of the cartel." *Id.* The court held that the "awareness" prong of the acquiescence standard can be satisfied by showing "that some elements of the government are in a collusive relationship with the torturers—even if the government generally opposes the groups." *Id.* (citing *Pieschacon-Villegas v. Att'y Gen. of U.S.*, 671 F.3d 303, 312 (3d Cir. 2011) (remanding to determine, inter alia, whether the alien could establish acquiescence despite evidence that the Colombian government had made efforts to demobilize guerilla groups and control corruption); *Gomez-Zuluaga v. Att'y Gen. of U.S.*, 527 F.3d 330, 351 (3d Cir. 2008) (holding that two government representatives each telling the alien that "there was nothing they could do to protect her" from the FARC "may be circumstantial evidence that the Colombian government was willfully blind to such treatment and that to pursue official assistance would have been futile")). According to the court, the Board had not properly considered, in light of controlling circuit precedent, "whether the record demonstrated that the Mexican government, despite its general efforts, is ultimately powerless to contain the violence caused by the Sinaloa cartel and corruption of law enforcement officials." The court granted the petition for review and remanded.

Fourth, Fifth, and Sixth Circuits

None

Seventh Circuit

Mendoza-Sanchez v. Lynch, 808 F.3d 1182, 1183-85 (7th Cir. 2015).

Members of a Mexican drug cartel accused the alien, a native and citizen of Mexico, of cooperating with United States law enforcement and threatened to kill him if he returned to Mexico. *Id.* at 1183. Cartel members told the alien that the cartel knew where in the country he had grown up, and the alien presented evidence that the cartel is "not confined to a State or a small area but its reach is nationwide," and that the "law enforcement agencies are infiltrated by the Cartels." *Id.* The State Department's human rights report on Mexico, which he also submitted, detailed the widespread corruption of Mexican police and their routine participation in the activities of drug organizations. *Id.* While the Immigration Judge found the respondent to be credible, he determined that the respondent had not established his eligibility for CAT relief. *Id.* at 1184. The Board affirmed, concluding that the alien had not "presented sufficient evidence

to establish that . . . a Mexican public official would acquiesce (or be willfully blind) to such harm." *Id.*

The Seventh Circuit reversed. The court noted that the record shows that "police officers routinely collaborate with and protect drug cartels in Mexico and . . . despite some arrests for corruption, widespread impunity for human rights abuses by officials remained a problem in both civilian and military jurisdictions. . . ." *Id.* The court further noted that "[s]ecurity forces, acting both in and out of the line of duty, arbitrarily and unlawfully killed several persons, often with impunity," and "[t]here were multiple reports of forced disappearances by the . . . police'"; "'authorities routinely failed to conduct thorough and expeditious searches and investigations in disappearance cases"; "there were credible reports of police involvement in kidnappings for ransom" and "frequent reports of citizens . . . beaten, suffocated, tortured with electric shocks, raped, and threatened with death in the custody of arresting authorities." *Id.*

Emphasizing police involvement in drug cartel activities, the court explained that the reports show that "police, particularly at the state and local level, were involved in kidnapping, extortion, and providing protection for, or acting directly on behalf of, organized crime and drug traffickers . . . . Local forces in particular tended to be poorly compensated and directly pressured by criminal groups, leaving them most vulnerable to infiltration." *Id.* One report describes an incident in which "members of a Mexico City drug gang kidnapped and killed . . . victims in retaliation" for violence committed against a member of the gang, and the suspects "includ[ed] four police officers." *Id.* The court finally determined that "the presence of the Mexican army in Matamoros supports rather than undermines [the alien's] claim that local police will acquiesce in his torture; had the police been protecting the city, the army would have had no reason to be there." *Id.* at 1185.

Based on this record, the court concluded that "[e]vidence that Mexican police participate as well as acquiesce in torture is found in abundance in this case." *Id.* at 1185. The court found that it was irrelevant if these officers are "rogue officers" compensated by the cartel to engage in isolated incidents of torture rather than evidence of a broader pattern of acquiescence in torture. *Id.* And no evidence had been "presented that the Mexican government can protect the citizen from torture at the hands of local public officials or to which local public officials are willfully blind." *Id.* (citing *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1137–38 (7th Cir. 2015) (holding that a government's success in controlling drug cartels, rather than its efforts in this regard, "bears on the likelihood of a person's being killed or tortured if removed to Mexico"). As result, the court remanded the case to the court for further proceedings.

Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1138-39 (7th Cir. 2015).

The alien feared that cartels would kill him in Mexico, and the court found that the police collude with the cartels and perpetrate violent acts on the cartels' behalf with impunity. Based on this record, the court reversed the Immigration Judge's denial of CAT. The court first found that the Immigration Judge erred in denying CAT after finding that the alien had not shown that "Mexican government" had acquiesced in torture because the regulation merely requires

acquiescence by a public official or individual acting in an official capacity. *Id.* at 1139 ("That Mexican police participate as well as acquiesce in the torture of the [the alien] is evidenced by the torture that police have already inflicted on [him], an atrocity consistent with the widespread understanding that many Mexican police are allied with the big drug cartels, such as the Zetas."). Second, the court found it irrelevant that the police officers were "rogue officials" because the alien "did not have to show that the entire Mexican government is complicit in the misconduct of individual police officers." *Id.* Third, the court held that it was irrelevant that the Mexican government was "trying," with little success, to control cartel violence. *Id.* (citing also *Madrigal v. Holder*, 716 F.3d 499, 509-10 (9th Cir. 2013) (concluding, in a case involving the Zetas cartel, that "if public officials at the state and local level in Mexico would acquiesce in any torture [that the alien] is likely to suffer, this satisfies CAT's requirement that a public official acquiesce in the torture, even if the federal government in Mexico would not similarly acquiesce").

Accordingly, the court concluded that "[i]f the Mexican government could be expected to protect the [alien] from the Zetas should he be returned to Mexico, the risk that he would be tortured or killed might be too slight to entitle him to deferral of removal." *Id.* at 1140. However, "though the immigration judge remarked that the Mexican government was trying to control the drug gangs, it is success rather than effort that bears on the likelihood of the [alien's] being killed or tortured if removed to Mexico." *Id.* The petition for review was granted and the record was remanded.

Eighth Circuit

Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009).

See full summary of facts on page 18. The court rejected the government's argument "that because 'the record . . . reflects that the Mexican government opposes corruption and collusion with drug cartels at its highest levels,' these officials could only be acting for 'personal gain'" since "the use of official authority by low-level officials, such a police officers, can work to place actions under the color of law even where they act without state sanction." *Id.* The court concluded as follows: "Undoubtedly, it is not contrary to the purposes of the CAT . . . to hold Mexico responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation's will and despite the fact that the actions may take place in circumstances where the officials should be acting on behalf of the state in another, legitimate, way." *Id.*

Ninth Circuit

Cordoba v. Holder, 726 F.3d 1106, 1117 (9th Cir. 2013) (remanding for further consideration of the alien's claim based on fear of torture at the hands of cartels where there was "[c]onsiderable evidence in the record—including the results of an investigation . . . finding that as many as 90% of federal police have some manner of link to a cartel").

Madrigal v. Holder, 716 F.3d 499, 502, 509-10 (9th Cir. 2013).

The alien petitioned for review of the Board's denial of asylum, withholding of removal, and CAT. The alien was a soldier in the Mexican army. As a soldier, the alien participated in anti-cartel activity, and at one point assisted in the arrest and transfer of ten members of the Los Zetas drug cartel. *Id.* at 502. While on authorized leave, the alien was kidnapped, beaten, and instructed to tell his commander that ten arrestees must be released or else all of the individuals who participated in their arrest would be killed. *Id.* The alien believed that his kidnappers were members of Los Zetas. *Id.* The alien told his commander, who did not believe the alien and did not release the arrestees. *Id.* Upon his return from a mission, the alien discovered that all of the soldiers who had arrested the ten members of Los Zetas had been beheaded. *Id.* Fearing for his safety, the alien left the army and moved in with his family. *Id.* When he learned that his commanding officer had been killed, he moved to a distant town. *Id.* His family lied whenever anyone asked about the alien's whereabouts. *Id.* The alien noted that strangers did ask his family where he was and he believed these strangers to be members of Los Zetas. *Id.* About five months later, the alien was shot at by unknown individuals. *Id.* No one else was present in the area, so the alien believed the bullets were intended for him and he testified that he had no enemies besides members of Los Zetas. *Id.* The alien fled the country. *Id.* After he moved to the United States, the alien's family received a threatening letter, threatening the alien's life. *Id.* The Immigration Judge and the Board denied CAT.

The court remanded because the Immigration Judge's and the Board's conclusion did not consider the Mexican government's ability to prevent the alien from being tortured, and noted that there was substantial evidence that state and local officials colluded with drug cartels in Mexico. *Id.* at 509 ("[W]hether Mexican officials would acquiesce in torture is related to the inquiry in the asylum context of whether the Mexican government is not just willing but also able to control Los Zetas, at least insofar as it would affect [the alien]. Both require examining the efficacy of the government's efforts to stop the drug cartels' violence, and both are affected by the degree of corruption that exists in Mexico's government.").

The court noted that "an applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in his torture. He need show only that 'a public official' would so acquiesce." *Id.* "Voluminous evidence in the record explains that corruption of public officials in Mexico remains a problem, particularly at the state and local levels of government, with police officers and prison guards frequently working directly on behalf of drug cartels." *Id.* at 509-10. The court held that the alien would be able to demonstrate acquiesce: "If public officials at the state and local level in Mexico would acquiesce in any torture [the alien] is likely to suffer, this satisfies CAT's requirement that a public official acquiesce in the torture, even if the federal government in Mexico would not similarly acquiescence." *Id.* at 510 (citing *Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (8th Cir. 2009)).

Li Chen Zheng v. Ashcroft, 332 F.3d 1186, 1189-96 (9th Cir. 2003) (remanding a CAT claim to the Board where corrupt Chinese officials at the local level colluded with human smugglers,

even though the national government "appears to be taking active measures to target people smugglers").

Tenth and Eleventh Circuits

None

Board

Cf. Matter of G-K-, 26 I&N Dec. 88, 98 (BIA 2013) (holding that "generalized evidence of government corruption in the record is insufficient to show that the Ghanaian Government would acquiesce in or turn a blind eye to torture").

Acquiescence and Torture under the Convention Against Torture

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Board of Immigration Appeals Training
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Learning Objectives

- Be aware of origins of CAT and understand its regulatory framework;
- Know types of harm and key requirements of viable CAT claim;
- Comprehend key concepts that arise in adjudicating CAT claims, such as "willful blindness" and acquiescence by local officials or individuals acting under "color of law"; and
- Understand how to resolve frequently recurring issues related to types of evidence presented in support of claim under CAT.

Introduction

1. Background
2. Burden of Proof
3. The Definition of Torture

Background: CAT

- Purpose: "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world"

- Art. 3: "No state party shall expel . . . a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

Background: CAT

- Significant dates
  - 1984 – adopted by UNGA
  - 1988 – signed by US
  - 1990 – ratified
  - 1994 – became binding
  - 1998 – implementation

Background: CAT

- Foreign Affairs Reform and Restructuring Act of 1998
  - "It shall be the policy of the United States not to expel . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture" FARRA § 2242(a)

Background: CAT

- Regs: 8 C.F.R. §§ 208.16-208.18, 1208.16-1208.18
  - Definition of torture
  - Protection in the forms of withholding of removal & deferral of removal
  - Eligibility criteria for protection

Background: CAT

- CAT deferral of removal – 8 C.F.R. § 1208.17
  - Likelihood of torture shown but applicant subject to bars in 241(b)(3)(B) of the Act that make applicant ineligible for CAT withholding – *see* 8 C.F.R. § 1208.16(d)(2)
    - *Persecutor, PSC, security threat, terrorist, serious non-political crime*

- CAT deferral differs from CAT withholding in that:
  - Continued detention possible following grant
  - DHS may seek termination of grant at any time
  - IJ must give notice to alien of conditions of grant

Burden of proof

- Applicant's burden – 8 C.F.R. § 1208.16(c)(2)
  - General standard: **more likely than not** that applicant would be tortured if removed
  - 7th Cir. standard: **substantial risk** of torture
    - *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135-36 (7th Cir. 2015)
    - *Gutierrez v. Lynch*, 834 F.3d 800, 804 (7th Cir. 2016)

Assessment of evidence

- Evidence relevant to the possibility of future torture - 8 C.F.R. § 1208.16(c)(3)
  - Past torture
  - Viability of relocation
  - Gross, flagrant, or mass violations of human rights
  - Other evidence relevant to the possibility of future torture

Assessment of evidence

- Failure to meaningfully consider all forms of evidence may result in remand
  - *Pieschacon-Villegas v. Att'y Gen. of U.S.*, 671 F.3d 303, 313 (3d Cir. 2011)
    - Board provided insufficient analysis of expert testimony and did not acknowledge expert witness
  - *Cole v. Holder*, 659 F.3d 762 (9th Cir. 2011)
    - Board did not discuss much of the evidence submitted, including country reports and R's credible testimony

Torture definition

- 8 C.F.R. § 1208.18(a)
- *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002)

Torture definition

(1) an act causing severe physical or mental pain or suffering

- 8 C.F.R. § 1208.18(a)(1),(4)

Torture definition

(2) intentionally inflicted

- 8 C.F.R. § 1208.18(a)(5)

Torture definition

(3) for a proscribed purpose

- 8 C.F.R. § 1208.18(a)(1)

Torture definition

(4) not arising from lawful sanctions

- 8 C.F.R. § 1208.18(a)(3)

Torture definition

(5) by or at the instigation of or with the consent or acquiescence of a public official

- 8 C.F.R. § 1208.18(a)(6),(7)


Break
Time!!

Understanding the Concept of Acquiescence

Where does it come from?

Under 8 C.F.R. § 1208.18(a)(1), torture must be:

1) Inflicted by or at the instigation of or w/ the consent OR
2) ***Acquiescence*** of a
3) ***Public official*** or other person acting in an ***official capacity***

What does ACQ do?

- ACQ limits CAT claims to torture that involves some act or inaction by gov't
  Negusie v. Holder, 555 U.S. 511 (2009)
- Similar to unable/unwilling concept in ASY/WH
  - But distinct (more on this later)

Purely Private Acts

- Common criminals
  Shehu v. Att'y Gen., 482 F.3d 652 (3d Cir. 2007)
- Domestic abusers
  Ali v. Reno, 237 F.3d 591 (6th Cir. 2001)
- Illegal acts by corrupt businessmen
  Lkhagvasuren v. Lynch, 828 F.3d 1080 (9th Cir. 2016)

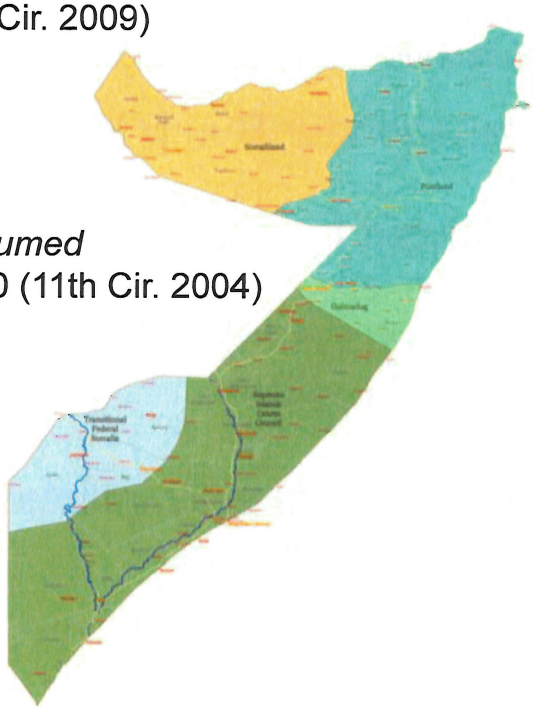
Lawless Areas

- Islamist Militants in Pakistan

  Ishitiaq v. Holder, 578 F.3d 712 (7th Cir. 2009)

- Somali Clans

  Mohamed v. Gonzales, 477 F.3d 522 (8th Cir. 2007); *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 820 (11th Cir. 2004)



Inflicted by Gov't

ACQ inapplicable where torture directly inflicted by public officials

Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015)

- Transgender R in MX
- Followed by police and sexually assaulted
- Soldiers assaulted her when she attempted border crossing
- B/c torture directly inflicted no need for separate showing of ACQ

Specific Intent

- Acquiescence distinct from ***specific intent*** req't
- Private actor may specifically intend torture
- Gov't need not act w/ specific intent
  - But gov't must still acquiesce in torture

    Cherichel v. Holder, 591 F.3d 1002 (8th Cir. 2010); *Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007)

Standard of Review

- Some circuits treat IJ determination re ACQ as factual finding subject to subst'l evidence review
  Green v. Att'y Gen., 694 F.3d 503 (3d Cir. 2012); *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008)

- Others view it as mixed question of fact and law
  De La Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010)

Standard of Review

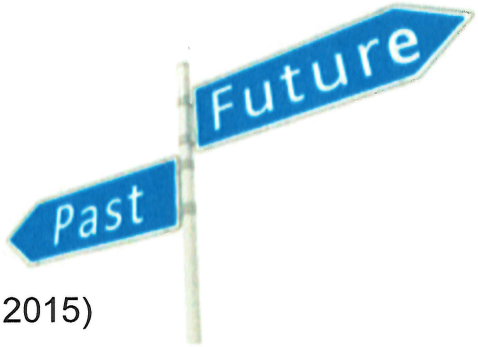
- Not clear Board reviews ACQ as finding of fact or legal determination
- Unable/unwilling concept in ASY/WH viewed as factual determination

  Gutierrez-Vidal v. Holder, 709 F.3d 728 (8th Cir. 2013); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011)

Past v. Future Torture

- Standard of review for ACQ may differ for past versus future torture
- **Past Torture**
  - Whether ACQ did or did not occur closer to legal determination
- **Future Torture**
  - Likelihood of future ACQ predictive finding

Matter of Z-Z-O-, 26 I&N Dec. 586 (BIA 2015)



Defining Acquiescence

Prior to torture, public official must:

1) have ***awareness*** of torture; and

2) thereafter ***breaches*** duty to stop it

8 C.F.R. § 1208.18(a)(7)

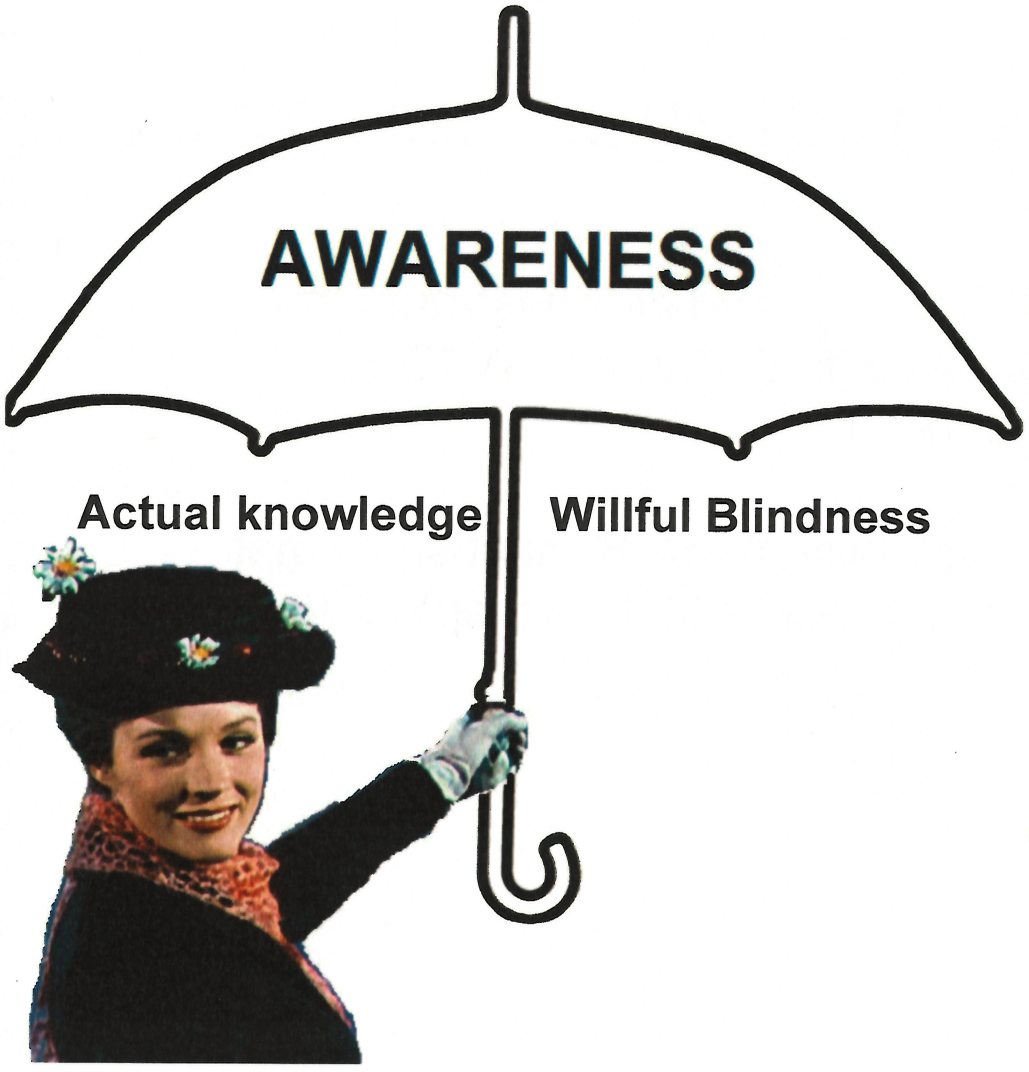
Defining Awareness

1988: POTUS transmits CAT to Senate w/ condition that ACQ requires public official to have "knowledge" of torture

- Senate disfavored this language

1990: Revised version replaces "knowledge" with "awareness" of torture

- Senate preferred this language
- Ultimately adopted in regulation


AWARENESS
Actual knowledge
Willful Blindness

Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000)

Issue: Whether R had demonstrated that guerrillas committed torture w/ ACQ of Colombian gov't

Held: To establish ACQ, R must show that Colombian officials "willfully accepted" torture

Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000)

Acquiescence defined as:

"silent or passive assent"

Inability to Control a Group:

"ought not lead to the conclusion that the government acquiesced to the group's activities"

Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002) (similar stnd)

Willful Blindness

Most courts have not deferred to ***Matter of S-V-***

View Board's holding as requiring:

1) Actual knowledge of a specific act of torture

2) Approval of act of torture, even implicitly

Willful Blindness

1st and 11th Circuits

- NOT formally adopted "willful blindness" standard

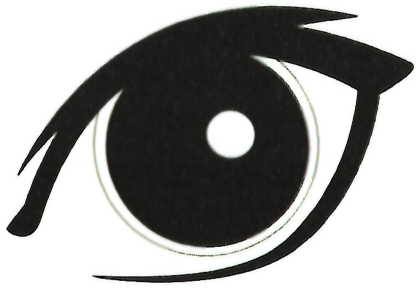
  Mayorga-Vidal v. Holder, 675 F.3d 9 (1st Cir. 2012); *Reyes-Sanchez v. U.S. Att'y Gen.*, 369 F.3d 1239 (11th Cir. 2004)

Board

General practice applies "willful blindness" standard

Turning a Blind Eye to Widespread Practice

- Official is aware of type of widespread form of torture but turns a blind eye to it



Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004)

- R fled Egypt; accused of murder
- Feared police would torture to extract confession
- Such torture was "routine"
- If police acting in official capacities, then CAT
- **BUT** if acting in purely private capacity "***routine***" nature of torture shows high-level officials "either know of the torture or remain willfully blind to it"

Standing By

- Official stood by b/c of ***inability*** or unwillingness to oppose the torture

  Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008)

Delgado v. Mukasey, 508 F.3d 702 (2d Cir. 2007)

- R kidnapped and threatened by FARC
- After release, made police report
- Told nothing they could do b/c she was "civilian"
- CC: Showed Colombian gov't allowed FARC to operate in "Switzerland-like zone" of country
- Board held no evidence of ACQ
- **Remanded:** Police statement plus country conditions potentially showed ACQ; R NOT req'd to show affirmative gov't consent to torture

Recall

ACQ has two elements:

1) awareness

2) breach

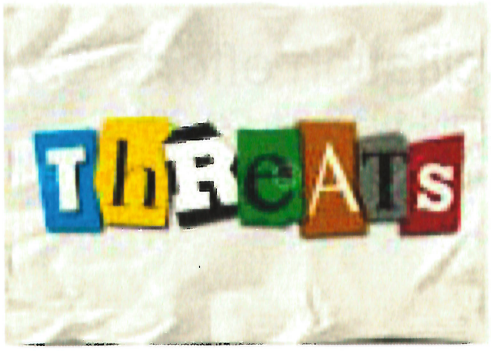
Gov't Actions not Satisfying Breach of Legal Duty

- Investigation, arrest, prosecution
  Ali v. Reno, 237 F.3d 591 (6th Cir. 2001)
- Large scale effort to combat criminal entities
  Saldana v. Lynch, 820 F.3d 970 (8th Cir. 2016)
- Warfare against insurgent groups
  Limani v. Mukasey, 538 F.3d 25 (1st Cir. 2008)
- Nat'l gov't reconciliation efforts b/w factions
  Alphonsus v. Holder, 705 F.3d 1031 (9th Cir. 2013)

Limited Information

Alvizures-Gomes v. Lynch, 830 F.3d 49 (1st Cir. 2016)

- R claimed gang members threatened him
- Reported to police after receiving threatening letter
- Letter was unsigned and composed of characters cut out from magazine pages
- Advised police "couldn't do much" w/ such limited info



Limited Information

Alvizures-Gomes v. Lynch

- **Holding**: Even in light of general evidence of police corruption and ineffectiveness, there was insufficient evidence of ACQ where R provided law enforcement w/ limited info re the individuals who threatened R

Failure to Report

- Failure to report can undercut CAT claim when:
  - Coupled w/ CC evidence gov't controls torture
    Mayorga-Vidal v. Holder, 675 F.3d 9 (1st Cir. 2012)
  - Coupled w/ absence of such evidence
    Musa v. Lynch, 813 F.3d 1019 (7th Cir. 2016)
- **BUT** it does not undercut claim where:
  - Reporting would be futile
    Afriyie v. Holder, 613 F.3d 924 (9th Cir. 2010)

Ineffective Gov't Efforts

Cambara-Cambara v. Lynch, 2016 WL 4758488 (8th Cir. 2016)

- Rs claimed family extorted by gangs
- Police investigated but didn't apprehend gangs
- Gangs had "better weapons" than police
- Police couldn't penetrate area where gangs hid

Held: Struggles of police to control gangs insufficient to establish willful blindness

Relevance of Inability

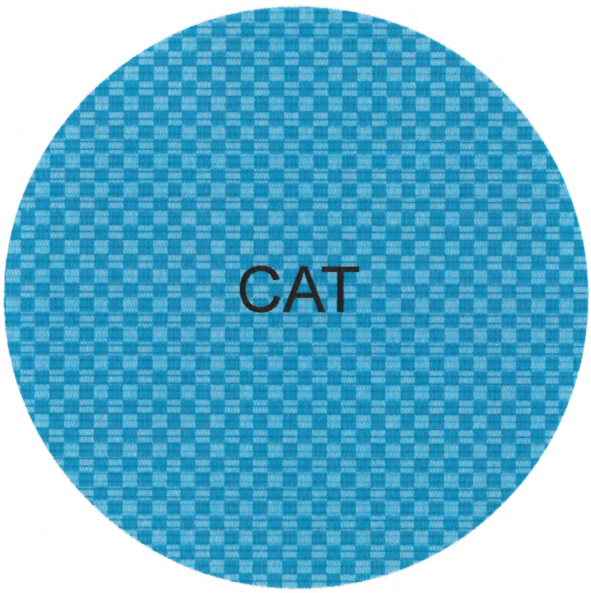
- ***Matter of S-V-*** held gov't inability to control third party insufficient to show ACQ
- Distinct from unable/unwilling stnd in ASY/WH, where inability can be dispositive

  See, e.g., *Khattak v. Holder*, 704 F.3d 197 (1st Cir. 2013)

Unable/Unwilling v. Acquiescence

Circuit Consensus
Inability Relevant Even If Gov't Willing

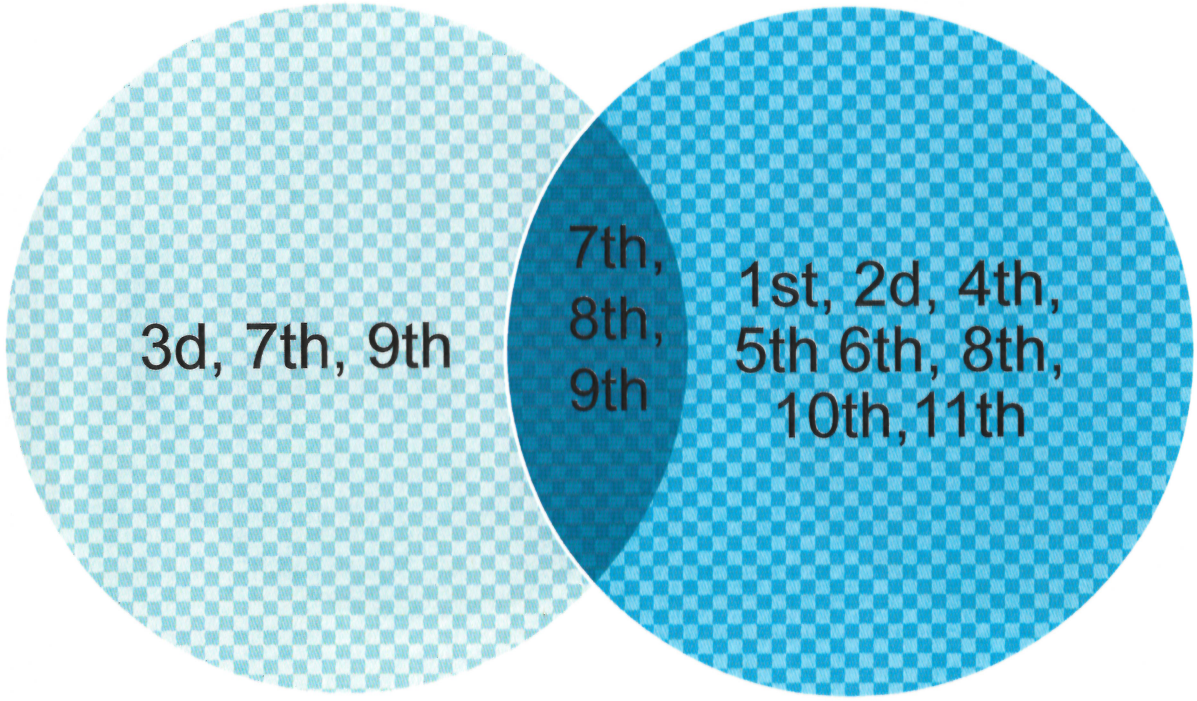
Matter of S-V-
Inability Irrelevant If Gov't Willing



Relevance of Inability re ACQ

Relevant even if Gov't Willing

Matter of S-V-
Irrelevant as long as Gov't Willing



Garcia v. Holder, 746 F.3d 869 (8th Cir. 2014)

- R was attacked by gang members who were extorting money from him
- Gang member who threatened R was arrested
- Gang member released after alleged bribe
  - Not clear if release due to corruption or threat
- Same gang member attacked R again
- CC: 66% police depts lacked resources/personnel; but Gov't enacted anti-gang laws

Garcia v. Holder

- **Held:** R had not shown ACQ
- Inquiry centers on ***willfulness*** of gov't non-intervention
- Gov't does **NOT** ACQ if it is aware of torture but powerless to stop it

Measuring Effort

8th Cir.

- Inability relevant if
- **Complete helplessness** in controlling private harm
- CAT doesn't require crime-free society

Compare Saldana v. Lynch, 820 F.3d 970 (8th Cir. 2016)

7th Cir.

- Inability always relevant
- **Success** of gov't efforts
- Relevant to **likelihood** of future torture

With Rodriguez-Molinero v. Lynch, 808 F.3d 1134 (7th Cir. 2015)

Inability to Control Gov't Officials

De La Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010)

- R informed on drug dealer in DR
- Dealer had connections in DR gov't
- R alleged that DR police were ineffective and corrupt
- BIA rejected claim, finding that police investigated R's claims and made arrests

Inability to Control Gov't Officials

De La Rosa v. Holder, 598 F.3d 103 (2d Cir. 2010)

Remanded for precedential opinion

- Board implied some gov't attempts to prevent torture negated complicity of other gov't actors
- Even when gov't as whole unable to prevent torture
- Not clear whether, under these circumstances, R has not shown ACQ as matter of law

Inability to Control Gov't Officials

Ramirez-Peyro v. Holder, 574 F.3d 893 (8th Cir. 2009)

- R feared cartels as confidential informant
- Evidence of police complicity in cartel violence
- BIA found MX gov't did not approve of actions of officers
- Thus any harm was merely product of inability, not gov't unwillingness to control police
- Remanded for further consideration of ACQ

Inability to Control Gov't Officials

Ramirez-Peyro v. Holder

Held: Different from cases where gov't merely was unable to control private actors despite concerted attempts

- Extensive police collusion w/ cartel
- General knowledge of gov't of such actions
- Plus inability to stop it

Matter of Chance?

Gonzalez-Benitez v. Lynch,

2016 WL 3569871 (2d Cir. 2016)

- Conflicting evidence re Salvadoran gov't efforts to combat gangs
- Evidence gang has infiltrated police
- **BUT** gov't attempting to fight gangs w/ some success & police w/ gang ties id'd and suspended
- R did not show ***more likely than not*** he would be tortured w/ ACQ

Who Acquiesces?

Under 8 C.F.R. § 1208.18(a)(1), torture must be:

"inflicted by or at the instigation of or with the consent or acquiescence of ***a*** public official or other person ***acting in an official capacity***"

Who's a Public Official?

- Person w/ political or gov't "affiliations"
  Kasneci v. Gonzales, 415 F.3d 202 (1st Cir. 2005)
  - Prison Guards
    Roye v. Att'y Gen., 693 F.3d 333 (3d Cir. 2012)
  - Police officers
    Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015)

Who isn't a Public Official?

- Person who ran for (but didn't obtain) public office
  Tendean v. Gonzales, 503 F.3d 8 (1st Cir. 2007)
- Disgruntled ex-gov't employee
  Ang v. Gonzales, 430 F.3d 50 (1st Cir. 2005)

Local versus National

- Only req'd to show "***a*** public official" would ACQ
- **NOT** entire gov't
- Where R shows more likely than not to suffer torture at hands of Local Officials, ACQ shown
- Regardless of whether National Officials would ACQ

  Mendoza-Sanchez v. Lynch, 808 F.3d 1182 (7th Cir. 2015); *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013); *Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009); *Guerrero v. Att'y Gen.*, 2016 WL 6091561 (3d Cir. 2016)

  But see *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013)

- Characterizing such local officials as "rogue" has met w/ little success in the 7th, 8th, and 9th Circuits
  - Such officers need not be furthering nation's interests
  - Nor need there be relationship b/w actions and duties

  Mendoza-Sanchez v. Lynch, 808 F.3d 1182 (7th Cir. 2015); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015); *Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009)

  But see *Costa v. Holder*, 733 F.3d 13 (1st Cir. 2013)

Under Color of Law

Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002)

- CAT reaches only torture inflicted/ACQ in under ***color of law***
- Defined pursuant to test from civil rights law

  Garcia v. Holder, 756 F.3d 885, 887-92 (5th Cir. 2014); *Baghdasaryan v. Holder*, 592 F.3d 1018 (9th Cir. 2010); *Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009)

Garcia v. Holder, 756 F.3d 885 (5th Cir. 2014)

- After R deported to ES, went to renew renew ID card
- Informed officials he had returned from US
- Four men dressed as police demanded $10k from R as returnee from US, threatened to kill his family
- Police took ID on bus and made call to unknown persons
- After getting off bus, four men assaulted R, saying beating was for unpaid money

Garcia v. Holder

Remanded for further consideration of ACQ:

- **Color of Law**: misuse of power, possessed by virtue of state law and made possible only b/c wrongdoer is clothed with authority of state law
- Personal objectives may be "under color of law" when officer uses his official capacity to further those objectives
- While not certain extortionists were police, they may have been getting info from public officials

Takeaway Points

I. ACQ limits CAT claims to those involving some gov't involvement

   A. Action or Inaction

II. ACQ requires at minimum "awareness" and willful blindness, NOT actual knowledge

III. Willful blindness encompasses:

   A. Turning blind eye to general practice of torture

   B. Standing by b/c of inability/unwillingness

Takeaway Points

IV. Ineffectiveness/inability in controlling private torture generally not dispositive of ACQ

V. However, it may give rise to ACQ if mixed record of gov't complicitly/involvement in torture

   A. Especially if local officials inflict/ACQ in torture

VI. Official is not "rogue" if he or she is acting under "color of law" when they inflict or ACQ in torture

EVIDENTIARY ISSUES THAT ARISE IN ASSESSING TORTURE CLAIMS

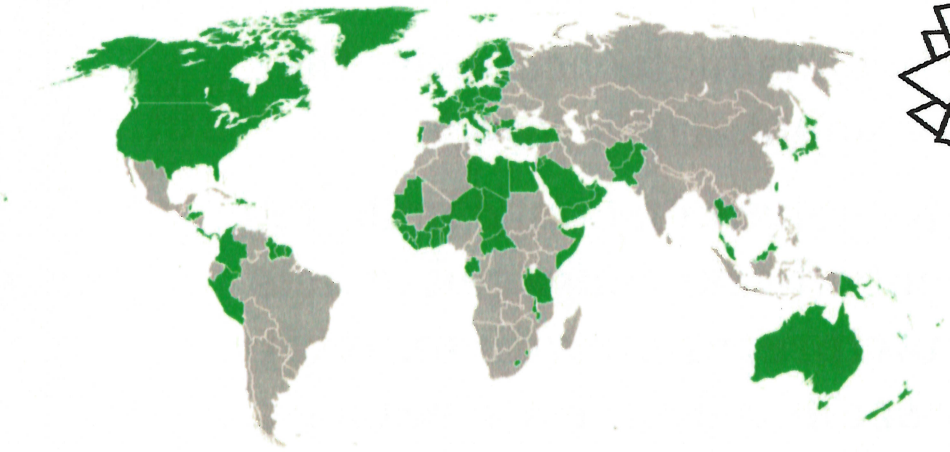
TOPICS COVERED

- Recent trends in Circuit Court cases which have remanded to the Board for reconsideration of CAT claims

- Practical pointers for staff attorneys in analyzing CAT claims

Recent trends in Circuit Court cases

Over the past year, Circuit Courts have remanded for further analysis of CAT claims where the BIA or IJ has not analyzed country conditions evidence in the record, particularly the State Dept. Report.



Lumanikio v. Lynch, 640 F. App'x 109 (2d Cir. 2016)

- The BIA did not adequately consider the issue of government acquiescence.
- The State Dept. Report on Congo indicated that government officials **"engaged in acts constituting torture, often with impunity, and often for seemingly private reasons."**

Bhattarai v. Lynch, --F.3d--, 2016 WL 4527559 (9th Cir. Aug. 30, 2016)

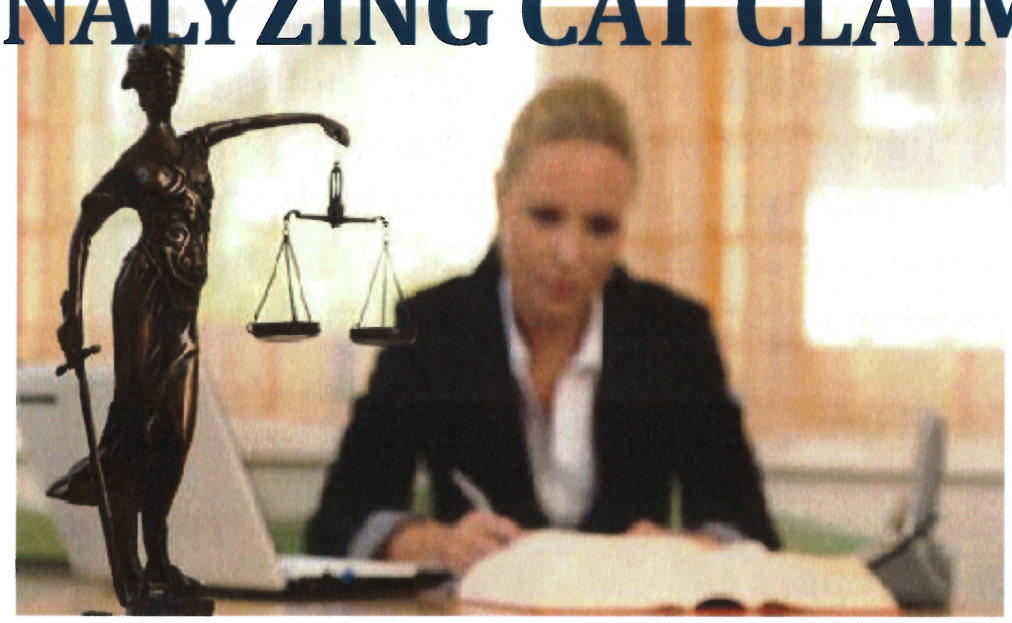
- The adverse credibility determination by the IJ and the BIA was not supported by substantial evidence
- The BIA *must* consider **"all evidence relevant to the possibility of future torture" including country conditions evidence.**

Walker v. Lynch, No. 15-184, 2016 4191844 (2d Cir. Aug. 9, 2016)

- Evidence of country conditions was overlooked by the IJ

- The BIA misapplied the standard by conflating the CAT's specific intent requirement with the concept of state acquiescence

PRACTICAL TIPS IN ANALYZING CAT CLAIMS



SUGGESTED GUIDELINES

1. **CAT standard** (i.e., R has met/has not met the BOP under the CAT because he has/has not established that he would more likely than not be tortured with the consent or acquiescence of a public official or other person acting in an official capacity)

2. **Expand the CAT analysis**

3. **Include specific references or quotes from the State Dept. report**

SUGGESTED GUIDELINES (cont'd)

4. **Even where there is an ACF, the country report should be specifically discussed**
5. **Admin. notice pursuant to 8 CFR §1003.1(d)(3)(iv)**
6. **Language to generally be avoided:**

   "Neither the IJ nor this Board is required to discuss every single piece of evidence in the record and provide an exegesis on every contention raised as long as the decision reflects meaningful consideration of the relevant substantial evidence."

- **We have considered the 2011 State Dept. Report regarding conditions in India and recognize that the report indicates a "generalized use of custodial torture in India."**

- However, we conclude these country reports do not show that the forces responsible for custodial torture would target R or that it is more likely than not that he would be tortured upon his return to India.

- **We have considered the 2014 State Dept. Report on Cameroon, which reflects that that Cameroon law prohibits organizations that advocate secession and the government's treatment of SCNC members is incidental to lawful sanctions.**
- We conclude these country reports do not identify any issues between the Cameroonian government and SCNC members such that R would be subjected to torture or that it is more likely than not that he would be tortured upon his return.


QUESTIONS
?